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Mary Dann and Carrie Dann

Docketed: Court: United States Court of Appeals
arch 6, 1984 for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: O'Connell, John D.

ntry	Date	Note	Proceedings and Orders
1	Jan 26 1984		Application for extension of time to file petition and order granting same until March 6, 1984 (Rehnquist, January 27, 1984).
2	Mar 6 1984	G	Petition for writ of certiorari filed.
4	Mar 26 1984		Order extending time to file response to petition until May 5, 1984.
5	May 7 1984		Brief of respondents Mary Dann, et al. in opposition filed.
6	May 5 1984		Brief amicus curiae of Western Shoshone Natl Council filed.
7	May 8 1984		DISTRIBUTED. May 24, 1984
8	May 22 1984	X	Reply brief of petitioner United States filed.
9	May 29 1984		Petition GRANTED.
			**********
10	Jul 13 1984	G	Motion of American Land Title Association for leave to file a brief as amicus curiae filed.
11	Jul 14 1984		Brief of petitioner United States filed.
13	Jul 23 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
14	Jul 23 1984		Justice Rehnquist denied any further extension beyond Aug. 20, 1984 to file brief of respondents on the merits.
15	Aug 13 1984	G	Motion of the Solicitor General to disperse with printing the joint appendix filed.
16	Aug 20 1984		Brief amicus curiae of Indian Law Resource Center filed.
17	Aug 20 1984		Brief of respondents Mary Dann, et al. and appendix filed.
19	Aug 20 1984		Brief amicus curiae of Western Shoshone National Council filed.
20	Aug 23 1984		Motion of American Land Title Association for leave to file a brief as amicus curiae GRANTED.
22	Aug 24 1984		Lodging received.
23	Aug 28 1984		CIRCULATED.
24	Aug 28 1984		SET FOR ARGUMENT. Monday, November 5, 1984. (3rd case)
25	Sep 18 1984		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
26	Oct 25 1984	X	Reply brief of petitioner United States filed.
27	Oct 29 1984		Record filed.
28	Oct 29 1984		Certified original record & C.A. proceedings, volumes I thru IV received.
29	Nov 5 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1476 (1)

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

MARY DANN AND CARRIE DANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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67 pp

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QUESTION PRESENTED

The Indian Claims Commission entered a final judgment awarding the "Western Shoshone Indentifiable Group" of Indians in excess of $26 million as damages for the extinguishment of their aboriginal title to over 24 million acres in Nevada and California. Section 22(a) of the 1946 Indian Claims Commission Act provides that upon "payment of any claim" adjudicated by the Commission, the United States receives a "full discharge" of "all claims and demands touching any of the matters involved in the controversy." Funds to pay the Western Shoshone judgment have been automatically appropriated pursuant to 31 U.S.C. (Supp. V) 724a. The judgment fund has been deposited in an interest-bearing trust account in the Treasury for the benefit of the Western Shoshones. However, the proceeds have not yet been distributed to individual Indians or committed to any other designated tribal purpose, pursuant to a plan established under the Distribution of Judgment Funds Act, 25 U.S.C. 1401.

The question presented is whether, under these circumstances, the Western Shoshone remain free to assert, in collateral litigation, that aboriginal title to lands covered by the Claims Commission award has never been extinguished.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MARY DANN AND CARRIE DANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-29a) is reported at 706 F.2d 919. The judgment order of the district court (App. B, *infra*, 30a-32a) is not reported. A prior opinion of the court of appeals is reported at 572 F.2d 222.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 33a) was entered on May 19, 1983. A petition for rehearing was denied on November 7, 1983 (see App. D, *infra*, 34a). On January 27, 1984, Justice Rehnquist entered an order extending the time

for filing a petition for a writ of certiorari through March 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 22 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, 25 U.S.C. (1976 ed.) 70u [1] provides:

> (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this [Act] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

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[1] The Act does not appear in the 1982 version of the United States Code because pursuant to 25 U.S.C. (1976 ed.) 70v, the existence of the Indian Claims Commission terminated on September 30, 1978. The residual docket of the Commission was transferred to the United States Court of Claims by 25 U.S.C. (Supp. V) 70v-3. Neither this transfer nor the subsequent reorganization of the Court of Claims into the United States Claims Court and the United States Court of Appeals for the Federal Circuit has any bearing upon the question presented.

STATEMENT

In this action, the court of appeals held that neither entry of a final judgment of the Indian Claims Commission awarding an Indian tribal group compensation for the extinguishment of their aboriginal title to land, nor the actual deposit of funds appropriated to pay the judgment into a trust account for the tribal group maintained in the Treasury, bars a member of the beneficially interested tribe from asserting, in collateral litigation, that aboriginal title has not been extinguished. The court further ruled that, contrary to the premise of the Indian Claims Commission proceedings maintained by the tribal group in which the claims award was made, the United States has never extinguished their aboriginal title to the lands in question.

1. The United States commenced this trespass action in 1974 by filing a complaint in the United States District Court for the District of Nevada alleging that respondents Mary Dann and Carrie Dann were grazing livestock on eight sections of federal public lands in the Elko Grazing District in Nevada without a grazing permit from the Bureau of Land Management (BLM). The complaint alleged that the unauthorized grazing constituted a violation of regulations issued by the Secretary of the Interior pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* The government sought an injunction barring the Danns from grazing their animals without a BLM grazing permit and also requested damages for the past grazing trespasses.

Respondents answered the trespass charge by asserting that BLM lacked authority to administer the lands because "said lands are beneficially owned by the defendants and other members of the Western Shoshone Tribe." The answer requested that the

court enter judgment declaring that "the defendants are members of the Western Shoshone Tribe of Indians" and that the "the Western Shoshone tribes of Indians are the recognized beneficial owners of the land" described in the complaint.

2. The lands occupied by respondents are a small part of a much larger area that was the subject of proceedings before the Indian Claims Commission at the time that the government's complaint in this trespass action was filed. The Indian Claims Commission had been established in 1946, in order to provide a monetary damages remedy against the United States for wrongs allegedly committed by the United States in its dealings with the Indian tribes. The Commission was authorized to "hear and determine" claims on behalf of any "Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States." 25 U.S.C. (1976 ed.) 70a. Claims within the Commission's jurisdiction included, at one extreme, some that were relatively conventional in nature, such as those based upon the Constitution, federal laws, treaties or executive orders (25 U.S.C. (1976 ed.) 70a(1); compare 28 U.S.C. (Supp. V) 1491), and, at the other extreme, some categories of claims as to which the United States had not consented to suit by non-Indian claimants: "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. (1976 ed.) 70a(5).

In the Claims Commission proceedings, originally filed in 1951, various Shoshone tribal groups sought, through representative parties, to recover damages for the loss of aboriginal title that they claimed to have possessed to lands located in Nevada, California, Idaho, Utah, Wyoming and Colorado. The Commission decided to consider the claims of the constituent bands or identifiable groups of the larger Shoshone

Nation individually. The Commission found that the Western Shoshone constituted a separate identifiable group for the purpose of presenting a claim against the United States. It also found that the Temoak Band of Shoshone Indians, a federally recognized band of Western Shoshones organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, was a proper representative of the Western Shoshone Identifiable group. Thus, the Temoak Band was authorized to maintain, on behalf of the entire group, a claim for damages for the extinguishment of aboriginal tribe to 22 million acres in Nevada and 2 million adjoining acres located in California that had allegedly been occupied by the Western Shoshone.[2] The basis for the claim, as set out in the claimant's Proposed Findings of Fact and Brief filed in the claims proceeding (at pages 2-3) was that the Western Shoshones' aboriginal lands had been "taken from them from time to time by" the United States and the United States "ha[d] obtained their lands and extinguished their original Indian title without compensation and under circumstances which did not comport with fair and honorable dealings * * *."

Following a trial and briefing of the land title issues, the Indian Claims Commission entered an interlocutory order on October 16, 1962, in which it found that the Western Shoshones had held aboriginal title to 24,396,403 acres of land in the present States of California and Nevada. *Shoshone Tribe* v. *United States*, 11 Indian Cl. Comm'n 387, 413-414 (1962). The Commission found that title to the Shoshone lands

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[2] See *Shoshone Tribe* v. *United States*, 11 Indian Cl. Comm'n 387, 388, 421-446 (1962); *Western Shoshone Identifiable Group* v. *United States*, 29 Indian Cl. Comm'n 5, 6, 63 (1972); *Western Shoshone Legal Defense and Education Ass'n* v. *United States*, 531 F.2d 495, 499 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

in California was extinguished on March 3, 1853. *Id.* at 415. With respect to the bulk of the lands, located in Nevada, the Commission found that aboriginal title had been extinguished over a period of years through "gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of the [Western Shoshones'] lands by the United States for its own use and benefit, or the use and benefit of its citizens." *Id.* at 416. Because it could not then identify a precise date for these actions as to particular parcels of land, the Commission reserved the question of the date of extinguishment of Indian title to the Nevada lands for further proceedings. *Ibid.*

In order to avoid complex litigation as to the extinguishment date for separate parcels, the Western Shoshones and the United States stipulated to an average extinguishment date of July 1, 1872, to serve as the valuation date for determining compensation due for the Nevada lands. The stipulation was approved by the Commission. See *Western Shoshone Identifiable Group* v. *United Stctes*, 29 Indian Cl. Comm'n 5, 7 (1972). Following a trial in 1967, the Commission determined the fair market value of the Nevada lands acquired from the Western Shoshones in 1872 to have been $21,350,000. *Id.* at 124.

3. Subsequently, in April 1974, while the parties were awaiting rulings by the Commission on issues that had to be resolved prior to entry of a final judgment, a group identified as the Western Shoshone Legal Defense and Education Association, with which the present respondents were associated,[3] sought to

[3] See Amicus Br. of the Western Shoshone Legal Defense and Education Ass'n, Mary Dann and Carrie Dann at 2, *Western Shoshone Identifiable Group* v. *United States*, No. 79-340; see also App., *infra*, 3a. (1979 Term).

intervene in the claims proceedings. The would-be intervenor sought to amend the claim to delete the request for an award covering certain acres including the lands at issue in this case, as to which it asserted that aboriginal title remained unextinguished. The intervenor also sought a stay of the claims proceedings pending a decision in this case, which had by then been filed in the district court. The Commission denied the motion to intervene, concluding, inter alia, that the question of extinguishment of aboriginal title had been presented to it and had been decided by it in its earlier ruling. *Western Shoshone Identifiable Group* v. *United States*, 35 Indian Cl. Comm'n 457, 465-471 (1975). The Court of Claims affirmed that ruling in *Western Shoshone Legal Defense and Education Ass'n* v. *United States*, 531 F.2d 495, 500 (1976),[4] and this Court denied certiorari. 429 U.S. 885 (1976). Throughout these proceedings, the Western Shoshone Identifiable Group adhered to the position that the extinguishment issue had been decided, and correctly so, by the Commission.[5]

4. Before further action could occur in the claims proceedings, the district court, on January 5, 1977, entered summary judgment in favor of the United

[4] The Court of Claims observed in an aside (531 F.2d at 503 n.16) that, because Section 22(a) of the Indian Claims Commission Act does not bar collateral attack upon determinations underlying Claims Commission decisions until a claim has been paid, the majority faction of the Western Shoshones retained the option, if it was so advised, to ask Congress to delay making an appropriation to pay the claims award while seeking to litigate its title claim.

[5] See, *e.g.*, Br. in Opp. for the Western Shoshone Identifiable Group at 4-9 & n.14, *Western Shoshone Legal Defense and Education Ass'n* v. *United States*, No. 76-90 (1976 Term).

States in the instant trespass action. The district court held that the Danns' assertion that aboriginal title to the lands they occupied remained unextinguished was barred by the collateral estoppel effect of the Indian Claims Commission's 1962 ruling that the United States had extinguished the aboriginal title of the Western Shoshones to their former lands in Nevada. *United States* v. *Mary Dann and Carrie Dann*, Civ. No. R-74-60 BRT (D. Nev. Jan. 5, 1977).

The court of appeals reversed, *United States* v. *Dann* (*Dann I*), 572 F.2d 222 (9th Cir. 1978). The court of appeals held that res judicata (claim preclusion) had no application because the Claims Commission's ruling was interlocutory (572 F.2d at 225). In that connection, the court of appeals observed that the statutory finality provision of the Indian Claims Commission Act, § 22(a), 25 U.S.C. (1976 ed.) 70u(a) did not become operative until a final judgment was entered and payment made (572 F.2d at 226). The court of appeals also held that collateral estoppel could in no event be applied to the extinguishment question, asserting that "[w]hatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation before the [Commission], the extinguishment question was not necessarily in issue, it was not actually litigated and it has not been decided" (572 F.2d at 226-227 (footnote omitted)). The trespass case was accordingly remanded to district court for further proceedings.

5. Thereafter, events moved forward again in the Commission proceedings. In November 1976, the Temoak Band, which had retained new counsel, reversed its earlier position, and moved the Commission to stay all proceedings pending a determination elsewhere of the Western Shoshones' claims that they still retained aboriginal title to their former territory in Nevada. The attempt to delay the Commission proceeding, however, proved futile. On August 15, 1977, the Commission denied the Western Shoshones motion for a stay and entered final judgment, awarding them in excess of $26 million. *Western Shoshone Identifiable Group* v. *United States*, 40 Indian Cl. Comm'n 305 (1977).

The Court of Claims affirmed. *Temoak Band of Western Shoshone Indians* v. *United States*, 593 F.2d 994 (1979). The Court emphasized the tardiness of the stay application that effected an abrupt reversal of over 25 years of litigation strategy by the Western Shoshones, and the fact that the Shoshones' were not willing simply to abandon their claim outright. The Court of Claims also noted (593 F.2d at 999) that, subsequent to its prior decision upholding the denial of Shoshone dissidents' motion to intervene (see page 7, *supra*), Congress had amended the standing appropriation covering Court of Claims judgments, 31 U.S.C. 724a, so as to extend its coverage to Indian Claims Commission judgments. Accordingly, it no longer remained possible for the Western Shoshones to forestall operation of the preclusion provision of the Indian Claims Commission Act, Section 22(a), simply by persuading Congress to defer an appropriation. Compare page 7 note 4, *supra*. But the Court of Claims emphasized that, even after the judgment had been appropriated, Congress's plenary power to deal with Indians was sufficient to allow it to adjust relations between the Western Shoshone and the United States in whatever manner it might deem appropriate, commenting, the "essential point of the matter is that the [Western Shoshones'] true appeal

is to legislative grace, not as of right to this court" (593 F.2d at 999).

This Court then denied certiorari. 444 U.S. 973 (1979). Although the Court of Claims had entered a temporary stay of its final order so as to allow the Secretary of the Interior to consider whether to support legislation establishing a reservation for the Western Shoshones, the stay was allowed to expire without action by the Secretary, who subsequently announced that he would not support an effort to establish a reservation.

On December 6, 1979, the Clerk of the Court of Claims certified the Commission's final award to the General Accounting Office for payment. Pursuant to the amended 31 U.S.C. (Supp. V) 724a, the award was automatically appropriated and it was deposited in an interest-bearing trust account in the United States Treasury for the Western Shoshone Identifiable Group.

6. On April 29, 1980, the district court entered final judgment in the *Dann* trespass case (App., *infra*, 33a). The district court, observing that this Court had denied certiorari in the claims proceedings and that the Commission's award had been certified for payment, held that the Judgment of the Commission had become final and that "the legal effect of the judgment for the purposes of the instant case is to extinguish the aboriginal Indian title to the lands of the Western Shoshone Indians upon which [respondents] assert the right to graze livestock * * *" (App., *infra*, 31a). The court stated, however, that the Danns had not been in trespass before December 6, 1979, because "[u]ntil the Indian Claims Commission judgment became final, such aboriginal Indian title had not been extinguished" (*ibid.*). The district court

accordingly granted the government's request for injunctive relief but denied damages for past trespasses (*ibid.*).

Both parties disagreed with this disposition and appealed. Respondents argued that collateral estoppel had no application to the extinguishment issue. The government argued that because of entry of final judgment in the claims proceeding, res judicata (claim preclusion) and collateral estoppel barred the respondents' assertion that the Western Shoshones retain aboriginal title to their former territory. In addition, because the award had been paid into a trust fund for the Western Shoshones, the government invoked the preclusive effect of Section 22(a) of the Indian Claims Commission Act, which provides that "payment of any claim" determined by the Commission "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." On its cross appeal, the government argued that the preclusive effect of the Claims Commission decision and award established that extinguishment of the aboriginal title had occurred in the past, not merely as of the date of payment of the claims award. In the alternative, the government argued that various discrete federal actions had, in fact, extinguished aboriginal title. Respondents challenged the government's extinguishment arguments, and denied that any preclusion doctrine was applicable. With regard to the effect of Section 22, respondents contended on appeal (for the first time in the litigation) that the award had not been "paid" for preclusion purposes because, although it had been deposited into the Treasury on behalf of the Western Shoshones, it had not yet been distributed to individual Western Shoshones pur-

suant to the Distribution of Judgment Funds Act 25 U.S.C. 1401 *et seq.* (DJFA).

b. The court of appeals reversed, ruling in favor of respondents on all issues. Adhering to its ruling in *Dann I*, the court of appeals held that collateral estoppel was inapplicable to the extinguishment issue, describing that issue as one not actually litigated in the claims proceeding (App., *infra*, 5a-7a). The court of appeals also declined to apply res judicata, reasoning that Section 22(a) of the Indian Claims Commission Act was intended to exhaustively set forth "the entire bar effect of a favorable claim determination" and thus to supplant the judge-made preclusion doctrine (App., *infra*, 7a-10a).

But the court of appeals also found the statutory bar of Section 22(a) inapplicable (App., *infra*, 10a-16a). The court acknowledged that the award had been automatically appropriated and had been credited to an interest-bearing Treasury account in the name of the Western Shoshone. Nevertheless, because the funds had not been distributed to individual Western Shoshone, or applied to collective tribal purposes pursuant to the DJFA, the court concluded that the Western Shoshones' claim had not been paid for purposes of the statutory preclusion provision. The court's reasoning rested in part upon the view that the ordinary meaning of "payment" does not comprehend a "transfer of funds that leaves such significant blocks in the way of delivery to the payee" (App., *infra*, 12a). But the court purported to rest its interpretation of Section 22(a) primarily upon the Court of Claims' comment in its 1976 decision in *Western Shoshone Legal Defense and Education Ass'n* (see page 7 & note 4, *supra*) that because the bar of Section 22 would not fall until payment of the

claim was made, the majority of the Western Shoshone, if so inclined, could still seek, after entry of a final judgment, to have Congress defer an appropriation, thereby averting preclusion.

The court of appeals recognized (App., *infra*, 13a-14a), that this comment was based upon the fact that in 1976 no standing appropriation had as yet been made applicable to judgments of the Claims Commission, and that Congress had subsequently made explicit provision for just such an arrangement. Yet the court refused to "conclude * * * that Congress by its change in the appropriation process intended to yield its final authority to affect the nature of an award before it acquires bar effect under Section 70u" (App., *infra*, 13a). Reasoning that the purpose of automatic appropriation of judgments was purely to eliminate a ministerial task, the court of appeals decided that Congress must have intended that the "payment" bar of Section 22 not go into effect until a plan for distribution of the judgment funds had been approved by Congress pursuant to the DJFA (App., *infra*, 12a, 13a-14a).

The court of appeals acknowledged that, in its 1979 decision in *Temoak Band of Western Shoshone Indians* (see page 9, *supra*), the Court of Claims had used "language [that] does suggest that payment might take place in the absence of congressional action" (App., *infra*, 9a). But because the Court of Claims had acknowledged that the Western Shoshones could seek relief from Congress even after the judgment had been paid, the Court reasoned that "this channel of congressional relief is best kept open by an interpretation of Section 70u that does not bar collateral litigation, which might produce results highly informative in making its decision, until Con-

gress has exercised its final discretion in dealing with the claim itself" (App., *infra*, 15a).

The court of appeals also rejected each of the government's arguments that, wholly apart from any preclusive effect of the claims judgment and award, the aboriginal title of Western Shoshone to the lands at issue here had in fact been extinguished (App., *infra*, 16a-28a). The court held that neither opening of the former Shoshone lands to settlement under the homestead laws or other public land laws, the establishment of the Duck Valley Reservation for the Western Shoshone in 1877, the administration of the lands occupied by respondents (and much of the remaining lands covered by the claims proceedings) by the BLM pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, nor the cumulative impact of all of these developments was sufficient to extinguish the aboriginal title of the Western Shoshone to the lands that are the subject of the trespass action.

REASONS FOR GRANTING THE PETITION

The court of appeals' crabbed interpretation of Section 22(a) of the Indian Claims Commission Act is plainly erroneous. The view that Section 22(a) should be interpreted to "preserve" for Congress the opportunity to take a final look at the merits of a claim underlying an Indian Claims Commission judgment for which funds have been appropriated and paid, in trust, into an interest-bearing Treasury account, is wholly contrary to the purposes of the Indian Claims Commission Act. It is also unsupported by any legislative history accompanying the Distribution of Judgment Funds Act or the amendments by which Congress made a standing appropriation applicable to final judgments of the Indian Claims Com-

mission. The court of appeals' interpretation of Section 22(a) is also squarely contrary to the decision of the Court of Claims in *Temoak Band of Western Shoshones* v. *United States*, 593 F.2d 994, cert. denied, 444 U.S. 973 (1979).

The court of appeals' decision fails, moreover, to observe a fundamental distinction between the role of the United States as a judgment debtor upon a claim adjudicated adversely to the United States, and the analytically distinct role of the United States as trustee of the tribal judgment fund created by payment of such a judgment. The decision below also gratuitously casts a substantial cloud upon federal title to an enormous land area in Nevada. Federal administration of this land area is placed in a state of limbo. The decision thus reflects a failure to heed this Court's recent admonitions stressing the importance of the preclusion doctrines that protect settled land titles.

1. Section 22(a) of the Indian Claims Commission Act states in relevant part: "The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." There simply is no adequate basis for the court of appeals' conclusion that "payment" does not occur within the meaning of Section 22(a) until such time as a final distribution plan has gone into effect under the Distribution of Judgment Funds Act.

Under the statutory framework in effect at the time the judgment of the Indian Claims Commission was certified to the General Accounting Office for payment, the amount of the award was automatically transferred (pursuant to an unlimited standing ap-

propriation) into an interest bearing trust account maintained on behalf of the Western Shoshone Identifiable Group in the Treasury. From that point onward, the Western Shoshones acquired a vested property right to the beneficial ownership of the judgment fund. At that juncture, the role of the government was converted from that of the Indians' judgment debtor to its familiar role as trustee of Indian property. See, generally, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 407-409 (1980).

Although the Congress and the Secretary must still determine, pursuant to the protective framework established by the Distribution of Judgment Funds Act of 1973, how such a judgment fund is to be parceled out to individual Indians or expended for the collective benefit of the tribal entity, the United States may not convert the trust fund to its own purposes without incurring a Fifth Amendment obligation to pay compensation. *Sioux Nation*, 448 U.S. at 408-409; *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937). Similarly, the United States may generally be held accountable thereafter for mismanagement of the trust fund. See *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 19; *United States* v. *Shoshone Tribe of Indians*, 304 U.S 111, 115-116 (1938); *Angle* v. *United States*, 709 F.2d 570, 574-575 (9th Cir. 1983); *Rogers* v. *United States*, 697 F.2d 886, 890 (9th Cir. 1983). The United States has also obligated itself to earn or pay interest upon such tribal funds. See 25 U.S.C. 161, 161a, 162a; *United States* v. *Mitchell*, slip op. 17 n.24, 18 n.29.

In short, when the United States formulates, approves, and carries out a distribution plan pursuant to the Distribution of Judgment Funds Act, it is not then making any "payment" of a claim by an Indian

tribe, band, or group. Rather, it is simply fulfilling its role as trustee to oversee the use of assets that are already in tribal ownership.

This Court previously has observed the very distinction—overlooked by the court below—between the role of the United States as a judgment debtor to an Indian tribe, which terminates upon the appropriation of a judgment fund by Congress, and the United States' role as a fiduciary for the tribe in overseeing the use of the judgment fund, which first commences upon appropriation. In *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977), a challenge to distribution arrangements legislated by Congress for an award of the Indian Claims Commission, the Court explicitly treated the judgment fund, once appropriated by Congress, as tribal property: "both the Commission award and the appropriation by Congress were the means of compensating that tribal entity for the wrong done to it." *Id.* at 85. Thereafter, "[a]s tribal property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes." *Ibid.*

2.a. Examination of the legislative history of the Indian Claims Commission Act and subsequently enacted statutes that bear upon the process of payment of Commission judgments and their ultimate distribution confirms that Congress did not intend to reserve to itself the opportunity to take a "final look" (App., *infra*, 12a) at the merits of the underlying claim that the court of appeals' decision "preserves" by treating a judgment as unpaid until a distribution plan is accepted by Congress. Therefore, by placing responsibility for deciding whether the payment bar

of Section 22 should be raised against the Western Shoshones' claim that they retain aboriginal title in the hands of Congress itself, the court of appeals' decision frustrates the fundamental purpose of the Indian Claim Commission Act.

That purpose was to divest Congress of responsibility for deciding the merits of Indian claims, as it previously had done by considering the requests of various tribal entities for passage of special jurisdictional acts. See H.R. Rep. 1466, 79th Cong., 1st Sess. 6 (1945). Moreover, Congress deliberately rejected suggestions that it retain for itself plenary authority to review the claims, treating the Commission's decisions as mere recommendations, adopting instead the language of Section 22(a) which treats the decision of the Commission "as a final judgment of the Court of Claims" payable subject only to the formality of the appropriations process.[8] The upshot

[8] The House report reflects Congress' expectation that Claims Commission awards would be routinely paid "in like manner as are judgments of the Court of Claims." H.R. Rep. 1466, *supra*, at 13. Significantly, the Department of Justice criticized this provision, arguing that "[i]n view of the vague basis upon which many of the claims presented to the Commission would be predicated" the "provision making the findings of the Commission binding upon Congress would constitute a surrender by Congress of its very necessary prerogative to sift and control this unusual type of claim against the Government." *Id.* at 17. The House was unpersuaded. While it emphasized that Congress would retain its traditional power to make or withhold appropriations to pay a judgment, it was expected that appropriations would be routinely made. *Id.* at 10, 13; 92 Cong. Rec. 5313 (1946) (remarks of Rep. Jackson).

The Senate was somewhat more receptive to the Department of Justice's argument and deleted the language of the House bill providing that the Commission's report should have the effect of a final judgment and should be paid like any other

is that in 1946 Congress meant to reserve to itself only the routine exercise of its authority to make appropriations; Congress did not contemplate that it would redetermine the merits of claims proceedings at this juncture.

b. Indian claims judgments obviously are different from most, if not all, other judgments of the Court of Claims in that they are made on behalf of a collective entity, and therefore pose questions of distribution. In the period following enactment of the Indian Claims Commission Act, as judgments were rendered, the Secretary of the Interior treated the judgment funds appropriated by Act of Congress, which were deposited to the credit of the tribe in the Treasury, as *tribal* property, which, he, as fiduciary of the tribe, had authority to distribute or to apply for the benefit of the Tribe. See H.R. Rep. 93-377, 93d Cong., 1st Sess. 4 (1973); 119 Cong. Rec. 32075 (1973) (remarks of Rep. Meeds). Congress became concerned, however, that the Secretary had given undue emphasis to individual distribution, and insufficient attention to needs for tribal development and education expenditures. *Ibid.*

Congress accordingly acted to oversee the Secretary's performance of his fiduciary duty. Beginning in 1963, the Interior Department Appropriations Act carried language that required the Secretary to submit distribution plans to Congress to allow it an opportunity to exercise a veto. See, *e.g.*, Department of the Interior and Related Agencies Appropriation Act,

Court of Claims judgment. See S. Rep. 1715, 79th Cong., 2d Sess. 6 (1946); 92 Cong. Rec. 9218 (1946). But the Senate version was rejected by the Conference, which adopted the present statutory language. See H.R. Rep. 2693, 79th Cong., 2d Sess. 8 (1946).

1963, Pub. L. No. 87-578, 76 Stat. 338. And commencing in 1965, this requirement was further stiffened by precluding distribution absent affirmative authorizing legislation. Department of the Interior and Related Agencies Appropriation Act, 1965, Pub. L. No. 88-356, 78 Stat. 276. Significantly, these appropriations riders were all phrased as restrictions upon the authority of the Secretary, otherwise recognized, to advance "*tribal* funds" to the beneficially interested tribe (emphasis added). In short, the appropriated judgment funds were regarded as tribal funds, albeit not immediately subject to disposal by the tribe in an unfettered manner. Congress merely wished to oversee the Secretary's performance of his fiduciary duty to manage this tribal property.

c. Having asserted its authority to govern distribution in this manner, Congress imposed a substantial burden on itself, which grew as the number of claims judgments grew. Ultimately, in 1973, Congress found it necessary to shift much of the responsibility back to the Secretary by enacting the Distribution of Judgment Funds Act, 25 U.S.C. 1401 *et seq.* Under that Act, the Secretary was directed to develop distribution plans after consultation with the affected tribe or group, and to present them to Congress for its review. A plan so proposed would go into effect unless vetoed by Congress within 60 days.

Nothing in the legislative history of the DJFA provides the slightest support for the court of appeals' view that adoption of a distribution plan is necessary to effect payment for the purposes of Section 22(a) of the Indian Claims Commission Act. Rather, the new procedure was intended to be a more efficient means of determining which individual Indians were to receive a share of the tribal trust fund and to relieve the Congress of the burden of primary

responsibility for devising distribution plans. See S. Rep. 93-167, 93d Cong., 1st Sess. 2 (1973); H.R. Rep. 93-377, 93d Cong., 1st Sess. 4-5 (1973); 119 Cong. Rec. 32075 (1973) (remarks of Rep. Lujan). Congress plainly did not intend, by enacting the DJFA, to institute a new level of congressional review of the merits of the claims underlying appropriated judgments. The DJFA was to create less work for Congress, not more.

d. As of 1973, it was still necessary for Congress to appropriate funds to pay a judgment entered by the Indian Claims Commission. This was true because Section 22 of the Claims Commission Act merely authorized appropriations to pay judgments under the Act, but did not provide for automatic appropriations. Moreover, Section 1302 of the Supplemental Appropriations Act of 1957, ch. 745, 70 Stat. 694-695, as amended, 31 U.S.C. 724a, which established a standing or automatic appropriation to pay judgments of the Court of Claims, was inapplicable to such judgments both because they were not considered judgments of the Court of Claims, and because the automatic appropriation provision then applied only to awards not in excess of $100,000. In 1977, however, the $100,000 ceiling was eliminated by the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 96-97. See H.R. Rep. 95-68, 95th Cong., 1st Sess. 142, 182-183, 184 (1977); S. Rep. 95-64, 95th Cong., 1st Sess. 173, 204-206 (1977). And in 1978, the automatic appropriation was explicitly made applicable to judgments of the Indian Claims Commission by the Supplemental Appropriations Act, 1978, Pub. L. No. 95-240, 92 Stat. 116-117. See S. Rep. 95-564, 95th Cong., 1st Sess. 76-77 (1977).

The combined effect of the 1977 and 1978 amendments to 31 U.S.C. 724a [7] was to eliminate the necessity for Congress to act to appropriate funds to pay judgments of the Claims Commission. Rather, once the final award was certified by the Comptroller General in the General Accounting Office, the appropriation was automatic. The legislative history of the 1977 and 1978 amendments to the Section 724a in no respect suggests that Congress intended to reserve to itself an opportunity to reconsider the claim by deferring the date of "payment" for purposes of Section 22(a) until the date a distribution plan became effective. Rather, Congress' sole concern was to dispense with a chore regarded as ministerial. H.R. Rep. 95-644, 95th Cong., 1st Sess. 53 (1977); S. Rep. 95-564, *supra*, at 76. It is simply irrational to suppose that the moment of "payment" somehow sprang from the point of appropriation to the point where a distribution plan was adopted, there being no hint in the legislative history of either the DJFA or the amendment to the standing appropriation provision that such a change was intended.

The foregoing statutory history demonstrates the error of the court of appeals' interpretation of Section 22(a). Congress simply never contemplated taking the "final look" at the underlying claim that the court of appeals "preserved" through its ruling that the preclusive effect of Section 22(a) is not triggered until a distribution plan is established.

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[7] Title 31 has now been recodified. The counterpart to former 31 U.S.C. (Supp. V) 724a is to be codified at 31 U.S.C. 1304(a). See Pub. L. No. 97-258, 96 Stat. 917. The recodified provision omits all reference to Indian Claims Commission judgments on the theory that the provision is no longer of current relevance, the existence of the Claims Commission having been terminated. See H.R. Rep. 97-651, 97th Cong., 2d Sess. 62 (1982).

3.a. The decision of the court of appeals obviously conflicts directly and irreconcilably with the Court of Claims' interpretation of Section 22(a) in *Temoak Band of Western Shoshone Indians*, 593 F.2d at 999, where the Court of Claims recognized that, in light of the application of the standing appropriation for judgments to the Indian Claims judgments, "Congress can no longer stop the payment and defer the extinguishment of the title claim, just by not appropriating," and that the Western Shoshones that seek land in lieu of a money judgment must now "appeal * * * to legislative grace" if they wish to achieve that result. The court of appeals did not deny the inconsistency of its analysis with that of the Court of Claims, suggesting only that it would be preferable, in its own view, as a policy matter, for the title issue to be determined by the courts, so as to educate Congress. But this suggestion simply ignores that *Congress* created the preclusion bar of Section 22(a), and, as the Court of Claims has emphasized (see pages 9-10, *supra*), retains at all times the power to recognize Western Shoshone title to any part of the lands in dispute that it wishes to recognize. If it chooses, Congress may even decide to allow the land title issue to be litigated without regard to the bar of Section 22. Cf. *Sioux Nation*, 448 U.S. at 390-407. But unless Congress waives the bar of Section 22, it plainly is inappropriate for a court to avoid that bar simply because it deems the results of litigation on the merits enlightening. Cf. *Block* v. *North Dakota ex rel. Board of University & School Lands*, No. 81-2337 (May 2, 1983), slip op. 18-19. The rendering of advice to Congress about possible future legislative action is not in itself a justification for the exercise by a federal court of decisionmaking authority that would otherwise be inappropriate. See *Muskrat* v. *United States*, 219 U.S. 346 (1911).

b. The court of appeals' decision could have a substantial adverse impact upon federal land administration and land titles over a large portion of the state of Nevada. While the present action was brought to enjoin an alleged grazing trespass on 5,240 acres of federal grazing lands, the panel's reasoning could easily be extended to encompass much of the 22 million acres in Nevada that were the subject of the Indian Claims Commission litigation. The Department of the Interior estimates that approximately 15.5 million acres of the claim area consist of lands currently being administered by the BLM pursuant to the Taylor Grazing Act and related statutes. Other significant federal land holdings within the claim area include the Ruby Lake National Wildlife Refuge, and portions of the Nellis Air Force Base Bombing and Gunnery Range, the Nevada Test Site (Department of Energy), Death Valley National Monument, and the Toiyabe and Humboldt National Forests. The remaining lands are in state or private ownership.

We have been advised by the Department of the Interior that Western Shoshone groups have, in the wake of the court of appeals' decision, begun to assert that grazing fees due from federal Taylor Grazing Act permittees in the Western Shoshone claims area should be paid instead to the Western Shoshones. While separate litigation might ultimately resolve claims to much of this land adversely to the Western Shoshones, the purpose of Section 22 will obviously be frustrated if such litigation becomes necessary. In addition, the Department of the Interior advises that there is at present a significant number of judgment funds, besides the Western Shoshone award, for which there is no judgment plan or statute authorizing the use or distribution of the funds. Because of the difficulties inherent in identifying the beneficiaries and their relative interests in a judgment fund, and disputes among the beneficiaries concerning distribution of the award (and whether it should be accepted) in some cases, it appears unlikely that distribution plans will quickly be formulated and approved in all of these cases. We believe that there are some outstanding judgments funds in cases where the claimant may wish to disavow a finding of extinguishment of aboriginal title and seek a land settlement. In such cases the decision of the court below stands, in effect, as an invitation to litigate the question of land title, even though the government has irrevocably committed its funds to a judgment fund constituting compensation for extinguishment of the very same titles.

We recognize, of course, that Congress may well have the occasion to consider the Western Shoshone claim for land in the process of acting on a proposed distribution plan or related legislation.[8] At that time, Congress may see fit to increase the amount of the award, to enact legislation granting the Western Shoshone recognized title to designated lands, or to adopt some other form of legislative adjustment. But Section 22 establishes the responsibility of the courts in this matter: to give preclusive effect to the final judgment of the Commission.

c. Our submission in this Court rests upon a statutory rule of preclusion rather than common-law rules of res judicata or collateral estoppel. But the policies that underlie the judge-made rules of preclusion are not inapplicable here. For over 25 years the

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[8] Congress is aware of the controversy surrounding the Western Shoshone award. See S. Rep. 97-658, 97th Cong., 2d Sess. 4-5 (1982).

Western Shoshone maintained the position in the claims proceedings that their aboriginal title had been extinguished. To permit that question to be reconsidered in another forum at this late date is at odds with fundamental principles of judicial economy and the disfavor with which inconsistent decisions are regarded. The respondents were active participants in the earlier unsuccessful effort by the Western Shoshones to derail the Court of Claims proceeding in its eleventh hour. It is particularly inappropriate, therefore, to allow the court of appeals to intercede now to bring about a different result that it deems more suitable.

The Court has recently reaffirmed the special rigor with which the policies of preclusion are to be applied in cases involving land title disputes. "Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open." *Arizona* v. *California*, No. 8 Orig. (Mar. 30, 1983), slip op. 13. Indeed, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 17-18 n.10. The decision of the court of appeals, which gratuitously invites the wholesale litigation of subsisting Indian title to land where compensation has been awarded for extinguishment of that title, cannot be reconciled with this teaching.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1984

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-4298, 80-4345
DC No. 74-0060 BRT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARY DANN and CARRIE DANN,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the District of Nevada

OPINION

Honorable Bruce R. Thompson,
District Judge, Presiding

Argued and Submitted January 13, 1982

[Filed May 19, 1983]

Before: FLETCHER, POOLE, and CANBY, Circuit Judges.

CANBY, Circuit Judge:

In 1974, the United States filed this trespass action against Mary Dann and Carrie Dann, alleging that the Danns were grazing their livestock on nine sections of public land without a permit, in violation of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), and the regulations issued pursuant to it, 43 C.F.R. pt. 4100 (1981). The Danns defended primarily on the

ground that they were Western Shoshone Indians and that they, along with others of that group, still retained aboriginal title to the land in issue. Aboriginal title is a right of occupancy arising from exclusive aboriginal possession of land, and it is valid against all parties until it is "extinguished" by the United States. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 587 (1823); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 669 (1974).[1]

The government countered this defense with the arguments that any title that the Western Shoshone ever had to the land in question had been extinguished, and that this fact had been conclusively established in proceedings brought before the Indian Claims Commission (ICC or Commission) on behalf of the Western Shoshone. In 1975 [sic], the district court accepted the government's collateral estoppel argument and granted summary judgment against the Danns. This court reversed and remanded to the district court in *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978) (per curiam) (*Dann I*). We held that collateral estoppel did not preclude litigation of the issue of extinguishment of title, because that question was "neither actually litigated nor actually decided in the proceedings before the ICC." *Id.* at 226.

[1] An extinguishment of aboriginal title by the United States does not give rise to a right of compensation under the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In this respect, aboriginal title differs from "recognized title" that may result from treaty or statute. Taking of recognized title is compensable. *United States v. Creek Nation*, 295 U.S. 103, 109-111 (1935).

The Danns originally claimed recognized title as well, but have since abandoned that claim and now depend solely on their claim of aboriginal title.

We further held that neither collateral estoppel nor res judicata (claim preclusion) could be applied because no final judgment had been entered in the claim proceedings, and that " '[f]inality' for this purpose does not attach until the Commission has filed its final report with Congress and the Indians have actually been paid the compensation owed them. (25 U.S.C. § 70u.)" *Id.* (footnote omitted).

Our opinion in *Dann I* fully set forth the background of this trespass action, as well as that of the Western Shoshone's suit before the Commission, but we will briefly restate the facts here. In 1951, the Western Shoshone made a claim against the United States under clause 4, section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1976).[2] The claim was based on the United States' having taken a vast expanse of Western Shoshone land in Nevada and California. The claim was prosecuted by the Temoak Band on behalf of the Western Shoshone identifiable group.

In 1974, a group of Western Shoshone, including the Danns, attempted to intervene in the ICC proceedings to remove from the pending claim certain lands, including those that are the subject of the present trespass action. The ICC rejected the intervention, and that ruling was affirmed by the Court of

[2] Section 2 of the Act, 25 U.S.C. § 70a, authorizes claims to be brought on behalf of "any Indian tribe, band, or other identifiable group of American Indians" for various matters, including:

> "(4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant. . . ."

Claims, which viewed the attempted intervention as an intratribal disagreement over the proper litigation strategy. *Western Shoshone Legal Defense & Education Ass'n v. United States*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976). In 1976, however, the Temoak Band itself reversed its prior posture and sought to stay the claim proceedings in order to seek an administrative declaration that the Western Shoshone still had title to approximately 12 million acres that they originally had claimed to have been taken. According to the Temoak Band, its original decision to pursue the claim did not constitute an election of remedies because there was no way that the Band could then have pursued the alternative of establishing its present title to the lands; the Indian Claims Commission had no jurisdiction to quiet title in the Western Shoshone, and neither equitable nor declaratory relief was otherwise available against the government until 1976. *See Dann I*, 572 F.2d at 227 n.3. The Commission denied the motion to stay its proceedings and entered its final award. The Temoak Band appealed the award to the Court of Claims, and the only error urged on appeal was the Commission's denial of that stay. The appeal was still pending before the Court of Claims at the time of our decision in *Dann I*.

After our decision in *Dann I*, the Court of Claims affirmed the award. *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979). It held that the stay had been properly denied because the Commission proceedings had lasted many years, and the motion for stay came too late for such a major change in litigation strategy. *Id.* at 998-99. The court added: "we think it is only Congress that could stay and

undo the course of litigation. . . . The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court." *Id.* at 999. As the Supreme Court subsequently denied certiorari, no further judicial review of the award is available. *See* 25 U.S.C. § 70s. Accordingly, in 1979, the Clerk of the Court of Claims certified the award to the General Accounting Office.

Informed of these developments, the district court in the present action rendered the decision now before us. The district court agreed with the government that, upon certification of the Commission award, the award was "automatically paid" and was therefore "final for purposes of res judicata and collateral estoppel." It further held that the effect of the award was to extinguish aboriginal Indian title to these Western Shoshone lands as of the date when the award was certified to the General Accounting Office, and that before that date title had not been extinguished. The district court accordingly issued an injunction against further trespasses by the Danns, but denied damages for previous trespasses, which had preceded the certification of the claims award. Both sides appeal the district court's judgment. We reverse the judgment granting the injunction and remand for further proceedings.

Collateral Estoppel (Issue Preclusion) and Res Judicata (Claim Preclusion)

The government does not at this juncture dispute the fact that the Western Shoshone at one time held aboriginal title to the lands in question here. It contends, however, that the issue of extinguishment of that title was actually litigated in the claim proceedings and that the Commission decided that title had

been extinguished. The district court was therefore correct, according to the government, in ruling that the Danns were estopped from asserting aboriginal title. The difficulty with this argument is that it runs directly counter to our ruling in *Dann I*. We held there that "the title issue in this case was neither actually litigated nor actually decided in the proceedings before the ICC." 572 F.2d at 226. We pointed out that in the claim proceedings, " 'the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose.' " *Id.* at 226 (quoting *Western Shoshone Legal Defense & Education Ass'n v. United States*, 531 F.2d at 500). We concluded that because the extinguishment of title issue had not actually been litigated, the Danns were not collaterally estopped from raising the title defense in the present proceedings.

Our holding in *Dann I* is the law of the case and we must follow it "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Kimball v. Callahan*, 590 F.2d 768, 771-72 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833-35 (9th Cir. 1982); *see Handi Investment Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392-93 (9th Cir. 1981); *Adamian v. Lombardi*, 608 F.2d 1224, 1228 (9th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980).

There has been neither a change in the nature of the evidence nor a controlling intervening decision. The government contends, however, that the collateral

estoppel ruling of *Dann I* was clearly erroneous. We do not believe that it was. It is true that the Temoak Band asserted in the claim proceedings that there had been an extinguishment of title by taking, and that the claims award necessarily rests upon such a taking.[3] But the extinguishment was not denied by the government, and the fact of the taking consequently was never actually litigated. Because an average "taking date" was stipulated, the Commission did not determine the facts of taking for any individual parcel of the vast aboriginal holdings of the Western Shoshone. Under these circumstances, issue preclusion is inappropriate. Restatement (Second) of Judgments § 27 comment *e* (1982); *see Sekaquaptewa v. MacDonald*, 575 F.2d 239, 246-47 (9th Cir. 1978). We therefore adhere to our ruling in *Dann I* that the Danns are not collaterally estopped by the claims decision from asserting aboriginal title here.

The government next contends that, apart from its collateral estoppel effect, the claims award operates by way of bar or merger to preclude the entire title claim of the Danns, under the provisions of the Indian Claims Act and the doctrine of res judicata. The applicable provision of the Act is 25 U.S.C. § 70u, which provides:

> 70u. Payment of claim after final determination; adverse determination as bar to further claims

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[3] In *Dann I* we found it unnecessary to decide whether the Danns were in privity with the claimants in the claim proceedings, because we gave the claims award no collateral estoppel or res judicata effect. 572 F.2d at 226 & n.1. We again decline to decide the question of identity or privity of parties, for the same reason.

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

(emphasis added).

We disagree with the government's contention that the bar provisions of the statute are not exclusive, and that an additional bar may arise from common law principles of res judicata. It is true that the first paragraph of subsection (a) states that a report favorable to a claimant that is filed with Congress "shall have the effect of a final judgment of the Court of Claims." In context, however, that statement appears to refer to the effect of the report on this legislative authorization and appropriation process and not to its collateral effect upon other proceedings. We think that the specific provisions of the second paragraph of subsection (a), that impose a bar upon *payment* of the claim, set forth the entire bar effect of a favorable claim determination and implicitly exclude others. Indian claims proceedings are highly extraordinary creatures of statute. In the absence of a recognized tribal organization, they may be brought by any member of an identifiable group of Indians on behalf of all members. 25 U.S.C. § 70i (1976). There is no provision for members to opt out of the proceedings, as there is in the case of class actions under Fed. R. Civ. Proc. 23(a)(2). Congress was careful to delineate the manner in which the judgments reached in these unusual proceedings would be effectuated. We are reluctant to add to the statutory sanctions. We conclude, therefore, that the bar arising from a favorable claim determination takes effect upon the payment of the claim, pursuant to section 70u(a). We decline to find any common law res judicata bar effect arising before that time.[4] Had Congress expected claims determinations to be governed by non-statutory principles of res judicata, it would have found no need to specify in subsection (a) that a bar arises from a favorable determination upon payment, and to specify in subsection (b) that a bar arises from a determination adverse to a claimant upon the filing of the unfavorable report with Congress.

Our conclusion that the bar arises only upon payment of the claim simply repeats what we stated in *Dann I*. *Dann I* was decided before the report of the Commission was filed with Congress. In denying

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[4] Our decision that the statutory bar provision is exclusive renders it unnecessary to determine whether other requirements of common law res judicata are met. In particular, we do not decide whether the Danns' defense in this trespass action is the same "claim" as that involved in the ICC proceedings. The district court, in its first summary judgment order of January 4, 1976 [sic], stated that it was unable to conclude that the claims were substantially identical.

claim preclusion for lack of finality of the award, however, we stated:

> "Finality" for [the purpose of the ICC Act] does not attach until the Commission has filed its final report with Congress *and the Indians have actually been paid the compensation owed them.* (25 U.S.C. § 70u.)

572 F.2d at 226 (footnote omitted) (emphasis added).

Has the Claim been Paid?

The government contends that the claim has been paid, bringing into effect the bar of section 70u(a). It points out that the final award was certified by the Clerk of the Court of Claims to the General Accounting Office, and that funds were thereupon automatically appropriated pursuant to 31 U.S.C. §724a (Supp. III 1979).[8] The amount of the award has

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[8] We acknowledge that the Danns did not contest in the district court the government's assertion that payment was now "automatic". The government first raised this "automatic payment" argument in its third supplemental memorandum to the district court, long after the district court had taken the parties' cross-motions for summary judgment under advisement. Normally an appellant may not present arguments in this court that it did not properly raise below. *Rothman v. Hospital Service of Southern California*, 510 F.2d 956, 960 (9th Cir. 1975), but application of that rule is discretionary. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). It is well settled in this circuit that where the new issue is purely a legal one, the injection of which would not have caused the parties to develop new or different facts, we may resolve it on appeal. *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1217-18 (9th Cir. 1978); *United States v. Patrin*, 575

been credited to a Treasury account for the benefit of the Western Shoshone. The government argues that these actions are more than sufficient to constitute "payment" within the meaning of section 70u(a) and *Dann I*. The issue is not resolved by *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976), where we ruled that payment of a claim removed any ambiguity that title had previously been extinguished, but where we left unclear whether appropriation amounted to payment. While the question is a close one, we conclude that "payment" has not been shown to have occurred in this case, and that the bar provision of section 70u(a) does not preclude the Danns from asserting aboriginal title.

Although funds have been appropriated and credited to an interest-bearing Treasury account in the name of the Tribe, no monies have actually passed into the hands of the Western Shoshone group or its members, nor have any been used for their benefit. Distribution and use of the awarded funds can only take place pursuant to a plan of use or distribution timely prepared by the Secretary of Interior and acquiesced in by Congress, 25 U.S.C. §§ 1401-07, or by separate legislation. We are advised that in the present case no timely plan was submitted, so that separate legislation will be required. Congress therefore retains significant control over the claims process until the distribution scheme is actually put into ef-

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F.2d 708, 712 (9th Cir. 1978). The question here is purely one of statutory construction that is both central to this case and important to the public. We excuse the Danns' failure to respond to a legal assertion contained in a supplemental memorandum advising the district court of post-submission events.

fect. We conclude that "payment" has not occurred within the meaning of section 70u(a) until Congress has taken its final look at the award and has either permitted a plan of distribution to become effective pursuant to 25 U.S.C. § 1403 or has legislated one. One reason for so concluding is that the ordinary meaning of "payment" does not seem satisfied by a transfer of funds that leaves such significant legal blocks in the way of delivery to the payee. Other reasons have to do with the interpretation of section 70u offered by the Court of Claims in *Western Shoshone Legal Defense and Education Ass'n v. United States*, 531 F.2d 495 (Ct. Cl. 1976), and with certain changes in the claims appropriation process thereafter made by Congress.

As we have already related, the Danns and others attempted to intervene in the Western Shoshone claims litigation in 1974. The intervenors sought to withdraw from the claim certain lands, including those at issue here, on the ground that the Western Shoshone still retained unextinguished aboriginal title to those lands. In affirming the denial of intervention, the Court of Claims ruled that the would-be intervenors were simply disagreeing belatedly over the litigation strategy permissibly adopted by the Temoak Band, which had brought the claim on behalf of the Western Shoshone. *Id.* at 503. The Court of Claims stated that the intervenors had failed to substantiate their assertions that a majority of the Western Shoshone group agreed not to include the disputed lands in the claim. *Id.* In response to the intervenors' fears that the issue of title might be foreclosed by the claim proceedings, the Court of Claims observed:

> It may also be noted that the bar of Section 22 [section 70u] does not fall until payment. . . . If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award. *Cf. Turtle Mountain Band of Chippewa Indians v. United States.* 490 F.2d 935, 951-53, 203 Ct.Cl. 426, 454-56 (1974). That course is still open if the majority of the Identifiable Group can be persuaded to follow it.

Id. at 503 n.16. This language of the Court of Claims was quoted and relied upon by this court in *Dann I*, 572 F.2d at 226. In refusing to give estoppel or bar effect to the non-final claim determination, we concluded that finality does not attach until the Indians actually have received payment. *Id.*

At the time that the Court of Claims dealt with the Danns' attempted intervention, Congress was required to pass an appropriation in satisfaction of each certified Indian claims award. Thus, if a majority of the Identifiable Group wished to appeal to Congress to modify the terms of the award, it could do so at the appropriation stage. In 1978, however, Congress amended the standing appropriations act, 31 U.S.C. § 724a, to include Indian claims awards. Thereafter, no separate appropriation by Congress was required. It was no longer feasible, therefore, for a majority of the Identifiable Group to follow the suggestion of the Court of Claims and ask Congress "to delay making the appropriation" in order to litigate title. We do not conclude, however, that Congress by its change in the appropriation process intended to yield its final authority to affect the nature of an award before it acquires bar effect under section 70u. Congress's pur-

pose in amending the standing appropriations act was simply "to reduce the workload of an unnecessary and strictly routine legislative step." House Comm. on Appropriations, Report on Supplemental Appropriations Bill of 1978, H.R. Rep. No. 644, 95th Cong., 1st Sess. 53 (1977). Congress still retained its oversight of the use or distribution of the award. It also provided for input from affected Indians in the preparation of a distribution plan. 25 U.S.C. § 1403 (Supp. III 1979). It therefore accords with the purpose of Congress, as well as the suggestion of the Court of Claims, to forestall the bar effect of an award when Congress delays the "appropriation and direction which will be necessary to pay the award." *See Western Shoshone*, 531 F.2d at 503 n.16.

It is true that in a subsequent opinion the Court of Claims used language that seems to point in a different direction. The occasion was an appeal that arose because, subsequent to our opinion in *Dann I*, the Temoak Band itself concluded that it had been pursuing the wrong claims strategy and asked the Commission to stay the claims proceedings. The Commission refused, and the Court of Claims affirmed. *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979). The court emphasized the tardiness of the proposed shift in strategy, and stated that if the Indians wished "to avert extinguishment of their land claims by final payment, they should go to Congress as recommended in *Western Shoshone*. . . ." *Id.* at 999. The court added:

> The matter is somewhat changed since the *Western Shoshone* footnote because Congress can no longer stop the payment and defer the extinguishment of the title claim, just by not appropriating. . . Thus it looks as if the Temoaks would have to get Congress to act affirmatively. In view of its plenary power over Indian tribal property, . . . we have no doubt that even after payment its action could be effective. And we think it is only Congress that could stay and undo the course of litigation at this late date, and if anybody should, it is only Congress.

Id. While this language does suggest that payment might take place in the absence of congressional action, it also clearly acknowledges the possibility of congressional intervention to permit collateral pursuit of the Western Shoshone claims to continuing aboriginal title. We think that this channel of congressional relief is best kept open by an interpretation of section 70u that does not bar collateral litigation, which might produce results highly informative to Congress in making its decision, until Congress has exercised its final discretion in dealing with the claim itself. Such an interpretation is not inconsistent with the actual holding of *Temoak Band* that the claims proceedings themselves ought not to be stayed for such collateral determinations. That holding simply requires that the award be made and that the issue of further proceedings be left up to Congress. Under our interpretation of section 70u, the Temoaks can avert loss of existing title by asking Congress to delay, just as the Court of Claims originally told them they could.[6] Congress can then permit collat-

[6] Nor is our interpretation of section 70u(a) inconsistent with the holding of *Six Nations Confederacy v. Andrus*, 447 F. Supp. 40 (D.D.C. 1977), *aff'd*, 610 F.2d 995 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980). There the bar of

eral litigation or invoke the bar of section 70u by allowing a plan of use or distribution to take effect or by legislating one.

We therefore conclude that "payment" of the Western Shoshone claim has not occurred within the meaning of 25 U.S.C. § 70u(a), and that the Danns are not precluded by that statute from asserting aboriginal title as a defense to this trespass action.

Extinguishment of Title as a Matter of Law

The district court, in rendering judgment based on the res judicata effect of the claims award, held that the effect of the award was to extinguish aboriginal Indian title to the lands in question, and that "[u]ntil the Indian Claims Commission judgment became final, such aboriginal Indian title had not been extinguished." Because the district court viewed the claims award as becoming final on December 6, 1979, well after the complaint for trespass had been filed, it dismissed the government's claim for damages but granted the requested injunction.

For reasons already stated, the district court erred in giving conclusive effect to the claims award. Even if the claims award had been entitled to conclusive effect, however, it could not result in the extinguishment of aboriginal title on the date the award became final. It was not within the jurisdiction of the Indian Claims Commission to extinguish Indian title on its own authority, nor did the Commission purport to exercise such jurisdiction. The ICC only had the power to award compensation for claims arising on or before August 13, 1946, whether those claims arose from the taking of aboriginal title or other action of the United States. 25 U.S.C. § 70a.

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section 70u(a) was given effect, but Congress had permitted a plan of distribution to go into effect.

Having concluded that the ruling of the district court regarding the res judicata effect of the claims award must be set aside, we are left with the district court's unelaborated conclusion that aboriginal title to the lands had not been extinguished prior to December 6, 1979. The government argues that the conclusion is erroneous because various acts of the United States over the past century have caused an extinguishment of the Western Shoshone aboriginal title to the lands in issue. Extinguishment may be accomplished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *United States v. Santa Fe Pacific R. R.*, 314 U.S. 339, 347 (1941). The intent must be clear, however; "an extinguishment cannot be lightly implied." *Id.* at 354. The actions that the government claims to have caused extinguishment are the following: (1) application of the public land laws, including the homestead laws, to the lands aboriginally held by the Western Shoshone; (2) creation of the Duck Valley Reservation for the Western Shoshone; and (3) administration of the lands pursuant to the Taylor Grazing Act for over 45 years. We will take these points in order, but first must address some threshold considerations.

The lands aboriginally held by the Western Shoshone were incorporated into the United States from Mexico by the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). That treaty did not deal unequivocally with the subject of aboriginal title; it guaranteed property rights of Mexican citizens within the yielded territories,[7] and also provided that in removing In-

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[7] In *United States v. Ritchie*, 58 U.S. (17 How.) 525, 538-40 (1854), the Supreme Court held that Indians had been accorded citizenship by Mexico in 1821.

dians or opening their lands to settlement, the United States should take care that those actions not cause the Indians to invade Mexico. *Id.* at 929-32. The Supreme Court subsequently made it clear, however, that Indian rights of occupancy survived the transfer of territory from Mexico. *Santa Fe Pacific*, 314 U.S. at 345-46. It also made clear the fact that Congress could extinguish such aboriginal title without raising any justiciable issue, because "[t]he power of Congress in that regard is supreme." *Id.* at 347.

The Danns contend that the power of Congress is not only supreme, but exclusive, and that mere executive action can never extinguish aboriginal title. We agree that executive action wholly unauthorized by Congress could not effect an extinguishment. *See Cramer v. United States*, 261 U.S. 219, 234 (1923); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 689 (9th Cir. 1976). The government argues, however, that extinguishment can result from executive action taken pursuant to general operating authority granted by Congress, and that Congress need not manifest clearly an intent to extinguish aboriginal title to the specific, designated lands in issue. We accept the government's contention that Congress need not display an intent with regard to individual tracts, but it is settled that Congress must make clear its intent to permit extinguishment as a result of any given piece of legislation. *Santa Fe Pacific*, 314 U.S. at 353-54. Any actions taken by the executive to extinguish Indian title depend for their efficacy upon Congress's acquiescence. *Southern Pacific Transp. Co.*, 543 F.2d at 689.

The government first relies on the subjection of the aboriginally held lands to the homestead laws. The Act of July 2, 1862, ch. 79, 12 Stat. 503, extended the

preemption laws to the Territory of Nevada, and the Homestead Act, ch. 75, 12 Stat. 392 (1862) (repealed 1976), applied to lands subject to preemption. The Preemption Act, however, had been amended in 1838 to except from its provisions lands to which "Indian title" had not been extinguished. Act of June 22, 1838, 5 Stat. 251, ch. 119 (1838). "Indian title" encompasses aboriginal title. *See Santa Fe Pacific*, 314 U.S. at 348-50. Congress in 1891 repealed the preemption law, and applied the homestead laws to all "unappropriated public lands." Act of March 3, 1891, ch. 561, § 5, 26 Stat. 1095, 1098. The Act also provided that nothing in it was to "change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands," and that the "disposition of such lands shall continue in accordance with the provisions of such treaties or agreement, except as provided in section 5 of this act." *Id.* at § 10, 26 Stat. at 1099. Section 5 of the Act stated the requirements for proof of improvement and cultivation of individual tracts claimed as homesteads.

We do not find in these provisions the clear expression of intent that would be required for us to hold that the homestead laws alone extinguished aboriginal Indian title in every state and territory where they were generally applicable. "[A]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Santa Fe Pacific*, 314 U.S. at 354. Nor do we think that the administration of the homestead laws by the executive within the aboriginal territory of the Western Shoshone extinguished aboriginal title to all those lands. Indeed it may be that aboriginally held lands do not qualify as "unappropriated public lands," in which case the executive is not

entitled to grant homesteads from them. *See Cramer v. United States*, 261 U.S. 219, 234 (1923). Moreover, even authorized land grants to third parties are not inevitably inconsistent with continued Indian rights of occupancy; the grantee may take subject to the Indian rights, which continue until properly extinguished by the United States. *See, e.g., Santa Fe Pacific*, 314 U.S. at 347; *Buttz v. Northern Pacific R. R.*, 119 U.S. 55, 66 (1886); *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1821).[8] In the present case, however, we are not dealing with any lands that the government has granted to third parties under the homestead laws; the Danns lay no aboriginal claims to such lands. It is enough for us to conclude, as we do, that Congress in passing the homestead laws evinced no clear intent to extinguish aboriginal title to Indian-occupied lands not actually subjected to a homestead grant, and that the granting of *some* homesteads within the Indians' aboriginal holdings did not represent a sufficient exercise of dominion over the ungranted lands to effect an extinguishment.

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[8] The cases of *Barker v. Harvey*, 181 U.S. 481 (1901), and *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924), are distinguishable. In both, the Supreme Court upheld the validity of patents issued to third parties as against an Indian claim of pre-existing aboriginal title, but the cases were controlled by a federal statute passed for the purpsoes of settling land claims in California. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631. The statute required all claims to be presented to a commission within two years and if no claim was presented, the land was to be "deemed, held, and considered as part of the public domain of the United States." *Id.* at § 13, 9 Stat. at 633. The Indian claims were not presented to the commission. The statute clearly evinced an intent to extinguish unpresented claims.

As we have noted above, the homestead laws that were extended to unappropriated public lands in 1891 provided that they did not modify any treaty provisions governing the disposal of Indian lands, and that the treaties continued to govern except insofar as the 1891 act provided for proof of improvement and cultivation of homesteaded land. 26 Stat. at 1099. The Treaty of Ruby Valley, 18 Stat. 689 (1863), which dealt with the lands in issue here, provided in part as follows:

> Article IV.
>
> It is further agreed by the parties hereto, that the Shoshonee [sic] country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building or other purposes in any part of the country claimed by said bands.

Article V of the treaty then described the lands claimed by the Shoshone, and Article VI provided for removal of the Shoshone to a reservation should one be established within the claimed country. In our view, these treaty terms reinforce the conclusion that application of the homestead laws to the Shoshone aboriginal territory did not work an extinguishment of their entire title. While Article IV does contemplate the establishment of mines and ranches within the territory, that provision and the two that follow it make no sense if it is assumed that *all* of the aboriginal territory is lost as soon as one or a few such ranches are established. It is clear that any loss

of territory is only so large as the incursion requires, and the Shoshone retain the rest. Thus the treaty agrees, at most, to a piecemeal loss of aboriginal title by specific establishment of mines, mills and ranches. The 1891 homestead law by its own terms did not "change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands," except as the 1891 Act provided for the method of proving improvement and cultivation of tracts actually homesteaded. Act of Mar. 3, 1891, 26 Stat. 1095, 1099. Thus the granting of homesteads by the government could work, at most, an extinguishment of aboriginal title to the actual land granted and no more.

The government next contends that the establishment of the Duck Valley Reservation extinguished aboriginal title to the lands claimed in the Ruby Valley treaty. The government points to Article VI of the Treaty, which provides:

> The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

18 Stat. at 690. On April 16, 1877, an Executive Order created the Duck Valley Reservation for the Western Shoshone. 1 C. Kappler, *Indian Affairs Laws and Treaties* 866 (2d ed. 1904). Approximately one-third of the Western Shoshone moved onto the new reservation; the rest did not.

Article VI is of little aid to the government, however, because the Duck Valley Reservation was not created from lands "within the country above described"; that is, it was not within the aboriginal territories described in Article V of the Treaty. The government argues that Article VI nevertheless controls, because the Duck Valley Reservation was for many years *thought* to be within the described territories. We fail to see how that error would render the government's action a compliance with Article VI.

The government further argues that, even if Article VI is inapplicable, it does not describe the exclusive means by which a reservation can be established with the effect of causing an abandonment or extinguishment of aboriginal claims outside of the reservation. Whether or not that proposition is correct, the government's contention that establishment of the Duck Valley Reservation extinguished aboriginal title is refuted by *United States v. Santa Fe Pacific R. R.*, 314 U.S. 339 (1941). In *Santa Fe Pacific*, the Walapai Tribe claimed that the railroad received certain granted lands subject to the tribe's right of occupancy. The Court noted that "[i]f the right of occupancy of the Walapais was not extinguished prior to the date of definite location of the railroad in 1872, then the [railroad's] predecessor took the fee subject to the encumbrance of Indian title." *Id.* at 347. The Court then dealt with the effect of a congressional statute establishing a reservation for the Walapais and others in 1865. The Court held as follows:

> We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, in-

cluding the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." . . . Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands if Congress would create a reservation. Futhermore, the Walapais did not accept the offer which Congress had tendered.

Id. at 353-54 (footnote omitted). In 1881, however, the Walapais themselves petitioned for a reservation because their ancestral lands were becoming uninhabitable by them. Only then did the Supreme Court find that aboriginal rights in lands that were notoriously claimed by others were extinguished by abandonment upon the establishment of the requested reservation. *Id.* at 356-58. We find no comparable petition in this case, and no clear indication of abandonment. Nor is there any clearer indication of an intent of Congress to extinguish aboriginal title of the Shoshone than

there was to extinguish the title of the Walapais by establishment of the Colorado River Reservation in 1865. We conclude that no extinguishment occurred when the Duck Valley Reservation was created.

The final action urged by the government as causing extinguishment of aboriginal title is administration of the lands in question under the provisions of the Taylor Grazing Act, 43 U.S.C. § 315 (1976). The Act, passed in 1934, authorized the Secretary of Interior

> to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States . . ., which are not in national forests, [or] Indian reservations . . ., and which in his opinion are chiefly valuable for grazing and raising forage crops.

Id. Shortly after passage of the Act, the Secretary established the Elko Grazing District which encompasses the lands here in dispute. Pursuant to regulations issued by the Secretary, 43 C.F.R. pt. 4110, a third party was issued a license to graze cattle on those lands.

We cannot agree with the contention of the government that the establishment of grazing districts amounts to the kind of intrusion that would cause a loss of Indian title under Article IV of the Treaty. That Article IV contemplated the establishment of "ranches" within the claimed aboriginal territory is clear from its terms. We do not believe, however, that the mere issuance of a grazing permit establishes such a "ranch," especially in view of the rule that doubtful terms are to be construed in favor of the Indians. *See, e.g. Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

The government also contends that cases such as *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975), make clear that inclusion of aboriginal lands within a grazing district under the Taylor Grazing Act extinguishes Indian title. The issue in *San Ildefonso*, however, was *when* a taking occurred of aboriginal lands; the taking itself was not in question.[9] The court made quite clear that when aboriginal title is extinguished over a period of time by a series of encroachments, practical compromises have to be made in choosing a date. The Commission rationally chose the date on which the lands were incorporated into a grazing district. 513 F.2d at 1390-92.

Quite a different situation is presented when the dispute is over *whether* aboriginal title has been taken. We do not find in the Taylor Grazing Act any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope. We do not find such an expression by implication in the Act's specific exclusion of Indian reservations. Indeed, we question whether aboriginally held lands can properly be characterized as "unappropriated and unreserved lands" forming a "part of the public domain" to which the Taylor Grazing Act applies. *Cf. Ash Sheep Co. v. United States*, 252 U.S. 159, 166 (1920) (lands ceded by tribe to

[9] Similarly, the comment of the Supreme Court in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 346 (1945), that the United States had administered Shoshone lands "as though no Indian land titles were involved" must be understood in context. There was no dispute before the Court as to the fact of taking. The only issue was whether the Indians had previously enjoyed "recognized" title to the lands taken.

United States under prescribed conditions not public lands available for grazing); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (lands beneficially owned by Pueblo not public lands). In any event, in the absence of a clear expression of congressional intent to extinguish title, the granting of a patent by the government and the acceptance of leases from that patentee have been held not to extinguish aboriginal title, *Cramer v. United States*, 261 U.S. 219, 234 (1923), and the same rule has been applied to other grants, *e.g.*, *Buttz v. Northern Pacific R.R.*, 119 U.S. 55 (1886); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1821). The grantee in such cases takes subject to the Indian right of occupancy. *Id.* We see no reason why the far more equivocal act of granting a grazing permit should effect an extinguishment.

The government cites *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976), as establishing that inclusion of aboriginal lands within a national forest extinguishes aboriginal title. It argues that such action is analogous to inclusion of lands within a grazing district. We do not agree that the multiple uses to which the government puts a national forest find an adequate comparison in the single use to which a grazing district is put. More important, however, is the fact that *Gemmill* did not rely solely on inclusion within a national forest as the event causing extinguishment. The Pit River Indians had been forcibly removed from the land by military action some hundred years before the decision. The court stated that "continuous use of the land to the present time for the purposes of conservation and recreation, *after the Indians had been forcibly expelled*, leaves little doubt that Indian title was extin-

guished." *Id.* at 1149 (emphasis added). The court then added that any remaining ambiguity was resolved by final payment of a claim for extinguishment of title. In summarizing, the court noted that "[a]ny one of these actions, examined in isolation, may not provide an unequivocal answer to the question of extinguishment." *Id.* We cannot therefore draw from *Gemmill* a rule that mere inclusion of aboriginal lands still held in Indian occupancy within a grazing district serves to extinguish Indian title. We reject such a rule here. Nor do we find the combination of circumstances relied upon by the government to show extinguishment in this case comparable to that in *Gemmill*, where one of the circumstances was removal of the Indians from their lands by force of arms.

CONCLUSION

We hold that the Danns are not barred by the doctrines of res judicata or collateral estoppel, or by the bar of 25 U.S.C. § 70u, from asserting aboriginal title as a defense to the claim of trespass in this case. The judgment of the district court is accordingly reversed. We further hold that the district court did not err in ruling that aboriginal title had not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley Reservation, or by inclusion of the disputed lands in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act.

In the pretrial order and in its supplemental memorandum filed with the district court on September 5, 1979, the government preserved for trial the factual issues of whether aboriginal title had been preserved to the date of trial and whether the Danns are entitled to share in it.[10] Those matters remain for determination in further proceedings in the district court.

REVERSED AND REMANDED.

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[10] The existence of aboriginal title is in every case a question of fact. *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 345 (1941). In the case before us, however, the federal government admitted the historical existence of aboriginal title when it stipulated in the pre-trial order that in 1848 the lands at issue "were part of a vast area exclusively used and occupied by the Western Shoshone." In any event, the government did not preserve any question of the historical existence of such title for determination at trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-74-60

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARY DANN and CARRIE DANN, DEFENDANTS

[Filed Apr. 25, 1980]

JUDGMENT GRANTING INJUNCTION

The Third Supplemental Memorandum filed by plaintiff on January 2, 1980, states:

> "This is to inform the Court that on December 6, 1979, the Clerk of the United States Court of Claims certified the final award of $26,145,189.89 in favor of the Western Shoshone Indians to the General Accounting Office for payment. (Letter of December 6, 1979, from Frank T. Peartree to Claims Division, General Accounting Office, copy attached hereto). This is the final award entered by the Indian Claims Commission in *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318, 453 (1977) *aff'd sub nom., Temoak Bands of Western Shoshone Indians v. United States*, —— Ct. Cl. ——, 593 F.2d 994 (1979), *cert. denied, Western Shoshone Identifiable Group v. United States*, 48 U.S. Law Week

> 3349 (Sup Ct. No. 79-340, Nov. 26, 1979). Therefore, in accordance with current procedures this judgment is automatically paid, *Temoak Banks of Western Shoshone Indians*, supra, —— Ct. Cl. at ——, 593 F.2d at 999, and the judgment of the Indian Claims Commission is now clearly final for purposes of res judicata and collateral estoppel."

The Court has read the references cited and they fully support the statements made. No opposition has been filed to the Third Supplemental Memorandum.

The judgment of the Indian Claims Commission is now final as of December 6, 1979. The legal effect of the judgment for the purposes of the instant case is to extinguish the aboriginal Indian title to the lands of the Western Shoshone Indians upon which the plaintiffs assert the right to graze livestock without complying with the Taylor Grazing Act and Federal Range Code. Until the Indian Claims Commission judgment became final, such aboriginal Indian title had not been extinguished. Accordingly, prior to December 6, 1979, defendants had not been in trespass on the public domain.

In consideration of the premises,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that defendants Mary Dann and Carrie Dann, and each of them, are hereby enjoined and restrained from allowing or permitting their livestock to be upon and graze upon the public lands of the United States unless and until they comply with the requirements of the Taylor Grazing Act and Federal Range Code.

IT FURTHER IS ORDERED that plaintiff's claim for damages be, and is hereby, dismissed.

DATED April 25, 1980.

/s/ Bruce R. Thompson
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 80-4298, 80-4345

DC CV 74-0060 BRT

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

MARY DANN and CARRIE DANN,
DEFENDANTS/APPELLANTS

Appeal from the United States District Court
for the District of Nevada (Reno)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered May 19, 1983

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. CA 80-4298, 80-4345

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARY DANN and CARRIE DANN,
DEFENDANTS-APPELLANTS

[Filed Nov. 7, 1983]

ORDER

BEFORE: FLETCHER, POOLE and CANBY, Circuit Judges.

The petition for rehearing is denied.

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RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
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No. 83-1476

In The
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Petitioners,

vs.

MARY DANN and CARRIE DANN,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. O'CONNELL
44 Exchange Place
Salt Lake City, Utah 84111

Attorney for Respondents

DATED May 2, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

The United States brought a trespass action in 1974 against individual Western Shoshone Indian respondents who were, and had been since time immemorial, in possession of the speciied tract of land under un-extinguished aboriginal title and Treaty right. Contemporaneously, a monetary claim for the taking of all Western Shoshone aboriginal lands was being prosecuted through the Indian Claims Commission. Unrepresented Western Shoshone Indians, including respondents, sought unsuccessfully to intervene in the claim proceeding in order to withdraw any claim for lands which were not actually taken. After the trespass action was submitted for decision, the Commission award became final and funds were appropriated under a standing appropriations act. Congress has refused to allow a determination of the class of beneficiary claimants or any distribution or use of the judgment fund without further legisiation.

The Question Presented is whether the automatic transfer of funds for payment of the Commission award triggered the "discharge" of the United States under the Indian Claims Commission Act, and if so, whether such discharge had the effect of justifying the issuance of an injunction ejecting Indians from lands to which they have an otherwise valid possessory title without a showing that such title had been extinguished.

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No. 83-1476

In The
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UNITED STATES OF AMERICA,

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On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Respondents, Mary and Carrie Dann, are individual members of a totally self-sufficient and autonomous band of Western Shoshone Indians which is one of many constituent bands comprising the Western Shoshone Na-

tion. The undisputed evidence in the district court below was that the Respondents and other members of the Dann Band and their predecessors have, openly, notoriously, and under an assertion of Western Shoshone title and treaty right, used and occupied the subject lands since time immemorial. Such possession was undisturbed and unchallenged until the United States of America instituted this action in 1974. The Dann Band is in similar possession of other lands, not directly involved in this litigation, some of which are fenced, irrigated and improved with structures. Despite the heroic efforts of the Government to delay and evade the issue, both the district court and the court of appeals below upheld the validity of the Western Shoshone title to the subject lands against every contention put forward by the Government to date.[1]

The Government does not ask this Honorable Court to review the decision upholding the validity of the Western Shoshone title to the lands occupied by the Danns.

Stripped of the artful sophistry, the Government's Petition seeks to have this Court review the question of whether an award of the Indian Claims Commission made to "The Western Shoshone Identifiable Group," an as yet undefined group of individuals, has been "paid" by unilateral manipulation of treasury accounts so as to justify the use of *equitable* relief to eject the lawful owners of land so that the "ancient wrong" upon which the award was incorrectly, if not fraudulently, predicated can now occur. As developed, *infra*, the Government makes these

1. The court of appeals below remanded the case to the district court for disposition of issues which the government purportably reserved for trial.

contentions in the face of contrary assertions of the Court of Claims in making the award, controlling statutes, and specific assertions of Congress pertaining to this litigation.

The Petition essentially admits that the overall problem is one which must and will be resolved through legislation but contends that, first, the Danns must be stripped of their herds and lands so that Congress may graciously return them. In any event, it is clear that Congress must now legislate some solution, and whether that is legislation simply approving a distribution plan effectuating payment, or comprehensive legislation settling land titles in the Great Basin, it will certainly moot the Question Presented.

REASONS FOR DENYING THE PETITION

Point I.

The decision below is not "plainly erroneous" and comports with the expressed intention of Congress to delay payment of this claim because of this very litigation.

In arguing that "payment is automatic" and occurs when funds are transferred to the Department of Interior and deposited in a treasury account, the Petition relies upon inferences drawn from statutory history, characterizations by the courts concerning the responsibility of the Government in managing the funds and self-characterizations of the capacity of the Secretary of Interior in handling those funds. The Petition ignores a specific statute

defining "payments in satisfaction of [Indian] judgments," 25 U.S.C. Section 118, and specific references by Congress to this very litigation and the intent of Congress with regard to the Western Shoshone Claim.

As the discharge provision of the Indian Claims Commission Act (I.C.C.A.), Sec. 22, 60 Stat. 1055, 25 U.S.C. Section 70(u) (1976 ed.) makes clear "appropriation of funds for payment" and "payment" are two separate events.

While it is true, that prior to amendment of the standing appropriations act, 31 U.S.C. (Supp. V) Section 724, Indians objecting to an I.C.C. award had access to Congress during the appropriation process and the amendment eliminated this access, there is nothing in the change of the appropriation act which pertains to the payment process itself other than providing funds for that process. Particularly, there is nothing that provides that "payment" is made *to* the Secretary of the Interior as guardian for the Indians as the Petition seems to claim.

Section 118 of Chapter 25, U.S.C., defines what constitutes "payment" of funds appropriated *for* payment.

> Section 118 Payments in satisfaction of judgments
>
> Payments to Indians made from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law.

Thus, it is clear that "payment" is to be made to Indians *by* Interior not *to* Interior as the Government contends.

The Distribution of Judgment Funds Act, 25 U.S.C. Section 1404, imposed detailed procedures upon the Interior Department in fulfilling the duty imposed upon it by 25 U.S.C. Section 118 in regard to judgments of the Indian Claims Commission. While the Distribution Act made it *possible* for Interior to accomplish that payment without further action of Congress and thus achieve "automatic payment", the Indian beneficiaries had two ways of delaying or stopping the process. First, 25 U.S.C. Section 1405 provided for a veto of the proposed plan for distribution by a resolution of either House of Congress which is probably what the Court of Claims was referring to when it commented that it "looks as if the Temoaks would have to get Congress to act affirmatively." *Temoak Bands v. United States*, 593 F.2d 994, 999 (Ct. Cl. 1979) (discussed *Infra* at 8).

However, there is another obstacle to "automatic payment." If the Department of Interior fails to submit the distribution plan to Congress within the time prescribed, and does not get an extension of the time period, the Department must then get legislation authorizing the distribution of the funds appropriated for satisfaction of the judgment just as if a resolution disapproving the plan had been passed. 25 U.S.C. Section 1402(a), (b), 1405(b).

In the case of the Western Shoshone award, the Department of Interior failed, succumbing to massive Western Shoshone resistance, to formulate a distribution plan within the prescribed time. An extension of time was sought, pursuant to 25 U.S.C. Section 1402(b), but was denied by the Senate Select Committee on Indian Affairs. Letter, Chairman John Melcher to Deputy Assistant Secretary of Interior, August 4, 1980. (Appendix A).

Among the reasons given by Senator Melcher for requiring legislation were that, "a significant number of Western Shoshone people *oppose acceptance of the award*" and:

> "There is pending litigation in the case of *U.S. v. Dann* in the U.S. District Court for the District of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue. (Ibid.) (Emphasis added).

Thus, the Western Shoshone succeeded in postponing the payment to Indians in satisfaction of the award required by 25 U.S.C. Section 118 by following the suggestion of the Court of Claims and getting Congress "to delay . . . direction which will be necessary to pay the award" so that they could "try out the issue of current title." *Western Shoshone Legal Defense & Education Association v. United States*, 531 F.2d 495, 503 n.16.

In the Report of the Senate Select Committee accompanying a later amendment to the Distribution Act, which approved distribution plans for other awards, it was stated:

> The Department of the Interior identied five judgments or awards which will require legislation irregardless of the passage of the amendments in this bill: . . . Western Shoshone. . . . The criteria employed by the Department in identifying these claims revolves around pending collateral litigation, strong feelings that there should be a land settlement, factionalism within the beneficiary entities respecting distribution of the award, or inability of competing entities to agree on a division of the award.

Senate Report 97-658. *See also* Senate Report 96-469 wherein the Acting Assistant Secretary refers to the failure to meet a distribution plan deadline as having the effect of "stopping payment". Thus, the contention of the Petitioner that congressional supervision of the distribution of judgment funds is limited to supervising the Interior Department in administering funds for its "wards" and has nothing to do with collateral litigation and the merits of the award, and that the Secretary had previously accepted the award on behalf of the Indians, is clearly refuted not only by specific Congressional statements respecting the instant case, but, similar statements of the client agency of the Petitioner itself made to Congress.

It should also be noted that the recipient of the award is the "Western Shoshone Identifiable Group" a class that has no existence other than as the nominal claimant before the Indian Claims Commission and has yet to be defined by the distribution legislation. That an award can be paid and satisfied without identifying even the class of persons receiving it is patently absurd.[2]

---

2. The Petition claims the funds were deposited to an account for the Western Shoshone Identifiable Group. Petition p. 10. Actually, they were placed in an account for the Temoak Bands according to the documentation presented by the Government to the court of appeals below. The Danns belong to a separate political subdivision of the Western Shoshone Nation, and have no direct connection to the Temoak Bands. Assuming that that Temoak Band is trustee, in turn, for the "Western Shoshone Identifiable Group" it should be borne in mind that the "group" is still undefined and is not coterminus with the Western Shoshone Nation. The distribution could ultimately be limited to those bands which have federally approved tribal governments and thereby exclude the Danns from the group. The court below declined to decide whether the Danns were in privity with "the claimants". Petition p. 7a, n.3.

Point II.

The decision of the Court of Appeals is not in conflict with the decision of the Court of Claims.

In affirming the Indian Claims Commission's refusal to grant the would-be intervenors the opportunity to prove their contentions that a portion of the lands included in the Western Shoshone claim had not been "taken" in any sense of that word, the Court of Claims did not agree with the Commission's statement that the extinguishment or "taking" had actually been litigated. *Western Shoshone Legal Defense & Education Association v. United States*, 531 F.2d 495, *cert. denied* 429 U.S. 885. Instead, the Court of Claims observed that the issue "never arose," 531 F.2d at 500. The Court of Claims conceded that the issue was an "open one which could be decided either way," 531 F.2d at 503, but declined to allow the matter to be litigated in the Commission by the intervenors. In a footnote at that point the Court of Claims addressed the would-be intervenors' fears that payment of the claim would foreclose the resolution of the issue in the instant litigation in the U.S. District Court for Nevada:

> If the majority of the Identifiable Group wishes to postpone payment in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation *and direction which will be necessary to pay the award* . . . That course is still open if the majority of the Identifiable Group can be persuaded to follow it.

Id. n.16. [Citation omitted, emphasis added]. The Petition, at page 23, makes much of the later observation of the Court of Claims in *Temoak Bands v. United States*, 593 F.2d 994, 999 (Ct. Cl. 1979) by quoting portions out of context. The Court of Claims states:

> If the Indians desire to avert the extinguishment of their land claims *by final payment*, they should go to Congress as recommended in *Western Shoshone*. 531 F.2d at 503 n.16, 209 Ct. Cl. at 59, n.16. If Congress wishes to alter or undo the normal course of Indian Claims Commission adjudication, it knows how to do it. *Cf.* Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153. The matter is *somewhat* changed since the *Western Shoshone* footnote because Congress can no longer stop the payment and defer the extinguishment of the title claim, *just by not appropriating*. [Emphasis added].

The Court of Claims then goes on to discuss the amendment of the standing appropriation act but at no time suggests that it makes it impossible to stop the payment. The Court of Claims was merely observing that stopping payment could no longer be accomplished *at the appropriation stage*, and it "looks as if" the Indians would have to get Congress to act affirmatively. As the quoted language makes clear, the Court of Claims renewed its suggestion that the Indians should *stop the payment* and resulting discharge by appealing to Congress. As argued in Point II, the Western Shoshone did just that. While unable to stop *appropriation*, they succeeded in having Congress withhold the "direction which will be necesary to pay the award." *Western Shoshone Legal Defense & Education Association*, quoted *supra* at 8.

The contention of the Petitioner that the decision of the Court of Appeals "conflicts directly and irreconcilably with the Court of Claims'" is simply not true. The fact that the Court of Claims *also* suggested that expropriation of existing title could even be averted *after* payment by exercise of Congress' plenary jurisdiction in separate legislation was clearly not the only relief available. That

court suggested that *payment itself* could still be stopped despite the unavailability of hearings at the appropriation stage.

Regardless, it is clear that the observations of the Court of Claims did not purport to be a holding as to when payment occurs. The holding of the court of appeals below is not in conflict with the holding of the Court of Claims or any other court.

Point III.

The decision below is interlocutory and may be mooted on remand. The question presented has not been raised in any other case and the possessory context of this case makes it unsuitable for clarification of the question.

(A) The decision of the court of appeals remanded the instant case for trial on the issues reserved by the Government for trial. In so doing, the court of appeals carefully crafted incentives to induce both the Government and the Western Shoshone National Council to devise a political and legislative solution to the overall problem which evolved from the historical neglect of Congress to comprehensively deal with the status of the vast deserts of the Great Basin since negotiating the Treaty of Ruby Valley in 1863. The court of appeals has given the Government the opportunity to prove, among other things, that the Western Shoshone Nation has failed to preserve title up to the time of trial and stated that legislation approving a distribution plan would result in "payment" within the meaning of the discharge provision of the I.C.C.A. The Senate Select Committee requested that the Department of Interior prepare legislation at the time

that committee stopped the judgment distribution almost four years ago. (Letter, Senator John Melcher to Acting Deputy Assistant Secretary, Appendix A).

Since the question of whether or not all Western Shoshone aboriginal title was actually extinguished in the nineteenth century has been resolved and the petitioner is not challenging that part of the decision below, Congress and the interested parties have the information needed, that is, that the Indian Claims Commission findings as to "taking" were erroneous. Even if the Government should prevail on the Question Presented it could not change the truth that the Commission award was based on a false assumption. In view of the public attention focused on this case it is hard to see how ejectment of the Dann Band will advance a legislative solution; it will just aggravate the problem by disrupting the status quo.

(B) While the Petition refers to the fact that there are other awards of the Indian Claims Commission which have been reported and funds for the payment made available pending approval of distribution plans, the Petition fails to point out any case where the Question Presented is actually involved in litigation, and respondents are not aware of any. Not only is the Question Presented likely to be mooted in this case, it may never arise again. In the event it does arise in other litigation, this Court will have the advantage of viewing the question in a context where the issue is dispositive and have the benefit of the analysis of another Court of Appeals.

(C) The peculiar procedural history and unique fact situation of this case complicates the Question Presented with other issues. While the Question Presented consists of two

parts, whether "payment" has occurred and, if so, whether the discharge provision of Sec. 22(a) of the I.C.C.A., 25 U.S.C. 70u(a) (1976 ed.) has any effect on a trespass case which was litigated and submitted prior to any such payment, the Petition only addresses whether "payment" has occurred. (For obvious reason, the Petition calls the *discharge* provision the "*bar* provision" of Sec. 22(a) throughout. Payment activates a discharge under the statute and no bar. The "bar" only applies to "a final determination against a claimant" and is contained in subsection (b) rather than (a) of the statute.) Also implicit in the Question Presented are the complex and grave due process and parties questions so adroitly avoided by both the Court of Claims and the Court of Appeals below.

The Indian Claims Commission Act, as stated in the Petition at page 4, was an act to compensate with money damages all sorts of wrongs committed by the Government against Indians which occurred prior to 1946. Section 22(a) provides that payment of any claim shall be a full discharge of the United States of all claims and demands touching any of the matters in controversy. The Danns are not making a "claim or demand" for monetary damages against the United States in this lawsuit. The United States is attempting to collect damages for trespass and to eject the Danns from lands which the United States claims, but cannot prove, to be "vacant, unreserved lands of the United States".

By its novel and unexplained interpretation of the discharge provision, the Petitioner is seeking to convert the Indian Claims Commission Act from a device for the compensation of victims of ancient wrongs to a device to accomplish and justify new wrongs, or, at the very least,

make the proceedings in the Indian Claims Commission a form of quiet title action despite the fact that that tribunal denied access not only to persons and entities claiming title but to persons, including the Danns, who were in possession. This cannot be accomplished without violating principles of statutory construction, procedural due process of law and common sense.

The petition does not explain how "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy" would actually assist it in this litigation. Assuming payment has been made, the United States would be released thereby from all liability for the taking of Western Shoshone lands prior to 1946. The Danns have no quarrel with that. But, a discharge of liability for a past taking of lands is hardly a writ for the future taking of lands. Just because a tort feasor pays for more damages than he actually inflicted does not give him the right to inflict more damage.

The United States cross-appealed the decision of the district court below because that court held that prior to the award being reported, Western Shoshone title had not been extinguished, but that the judgment somehow had the effect "to extinguish the aboriginal title to the Western Shoshone Indians upon which [the Danns] assert the right to graze livestock." Petition p. 31a. The Government, by no longer contesting the existence of Western Shoshone title prior to the award of the I.C.C., now appears to be asking this Court to affirm the district court decision it previously appealed, and find that the Danns' rights, rather than the government's liability, were extinguished by the discharge provision of the I.C.C.A. in December of 1979.

The government is not only changing its position in the course of this litigation, it is changing the position it adopted in other litigation, a position it adopted by necessity to protect the Claims Commission from an attack challenging its constitutional validity.

In *Osceola v. Kuykendall,* 4 Ind. L. Rep. F-80 (three judge panel, D.C.D.C. May 20, 1977) (slip opinion Appendix B), a Seminole Indian, in possession of lands in the Florida Everglades under an assertion of Seminole aboriginal title, sought to have the Indian Claims Commission Act held unconstitutional because he and other similarly situated Seminoles were denied access to the Indian Claims Commission to dispute that all the Seminole lands in Florida had been taken as alleged by the Seminoles of Oklahoma. The panel dismissed the lawsuit because the Seminole Claim in the Indian Claim Commission did not constitute a threat to the Seminole Indian's possessory interests.

> Entry of the judgment will create no new property rights in the United States, for the United States already holds fee simple title to the land, subject only to any rights of possession which plaintiff and others like him may have. Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment. 4 Ind. L. Rep. at F-81.

Thus, the peculiar representative scheme of the Indian Claims Commission, which allows claims encompassing vast areas to be prosecuted without notice or allowing access to persons claiming a possessory interest in those lands, was not subject to constitutional review because the government argued, and the panel accepted, that a judgment of the Indian Claims Commission for the taking of

Indian lands would not affect the property interest of those Indians who were in possession.

Here the Government is reversing that position and attempting to use a similar Indian Claims Commission judgment to eject Indians, who also were denied any opportunity to present evidence[3], from lands they have continuously used, occupied and improved under aboriginal title and treaty right.

Throughout the proceedings in the Western Shoshone claim before the I.C.C., the Indians were informed that those proceedings would have no effect on any existing title. At the time of the attempt at intervention, the attorney prosecuting the claim informed the Commission that *all* the Western Shoshone Indians had expressed concern that "they would lose their land" and he had been forced to continually assure them: "This lawsuit is one for compensation. *It doesn't change your title one bit.*"[4] The

---

3. The would-be intervenors, who indirectly included the Danns, sought to prove that lands were included in the claim which had not been taken, including lands that had been continuously occupied and were currently necessary for the subsistenance of Western Shoshone groups. The Intervenors contended that the Government and the Representative Plaintiff were in collusion by agreeing to represent that all Western Shoshone lands had been taken when, in fact and law, they were not. The Indian Claims Commission held an oral argument which it purported to limit to discussion of the meaning of "collusion" and denied the would be intervenors the opportunity to introduce any evidence. Transcript I.C.C. Hearing, Nov. 14, 1974, Defendants' Exhibit 8, pp. 67-68. The Commission then went on to find, based solely on the record made by the parties to the alleged collusion, that there was no collusion and, therefore, the would-be intervenors had no rights to access.

4. Transcript I.C.C. Hearing, Nov. 14, 1974, Defendants' Exhibit 8, p. 21.

Government remained silent, not informing the Commission that it contended that a discharge under the I.C.C. would extinguish all existing title. Even after the district court below issued its order finding that the award had extinguished all Western Shoshone title, the Government took the admittedly unusual step of filing a brief in support of the claims attorney, in a fee dispute with affected Western Shoshone Indians, without informing that court that the Government was by then contending that the award obtained by the claims lawyer had destroyed the client's title to millions of acres of land including all the Indians' grazing lands.

The Court of Claims sought to avoid sifting through the sordid procedural history of the Western Shoshone claim despite the claims of out-right fraud and deceit as well as blatant denial of due process of law by offering the unrepresented Indians a hearing before Congress before their rights could be foreclosed. The court below avoided the constitutional procedural due process issue, as was its duty, by reasonably interpreting the discharge provision to keep open that congressional remedy. If that remedy is foreclosed, then the procedural due process issue must be confronted. To say that the Danns may seek separate legislative relief by invoking the plenary power of Congress after they lose possession to their lands is certainly no answer because they are entitled to procedural due process as a matter of constitutional law, not legislative grace.

The Danns will also assert substantive due process rights to their land, if certiorari is granted, because they have asserted recognized treaty title throughout these proceedings and because the doctrine that aboriginal title

is not protected by the Fifth Amendment would need to be re-examined if it is applied, not to some ancient taking where racism was an accepted part of American life, but to an atrocity which the Government is asking a court of equity to execute through injunctive relief. It should be added that to counsel's best knowledge, never in the history of the United States of America has the judicial branch taken an active part in separating Indians from their lawfully held lands. There is a profound difference between a court refusing monetary compensation for a wrong committed by another branch of government, and a court itself ordering the wrong to be committed. That is a threshold which has never been crossed, and it is most respectfully submitted that this Honorable Court should not deign to even consider crossing it.

CONCLUSION

For the reasons stated herein, the Respondents, Mary Dann and Carrie Dann, implore this Honorable Court to deny the Government's Petition for a Writ of Certiorari, put an end to this unreasonably protracted trespass case against Respondents, and let the Government and the Western Shoshone Nation seek a legislative solution to what is obviously a political problem which underlies and dwarfs the narrow legal case at bar.

Respectfully submitted,

JOHN D. O'CONNELL
44 Exchange Place
Salt Lake City, Utah 84111

Attorney for Respondents

DATED May 2, 1984

APPENDIX A

UNITED STATES SENATE
Select Committee on Indian Affairs
Washington, D.C. 20510
August 4, 1980

Ralph R. Reeser
Acting Deputy Assistant
Secretary of Indian Affairs
Office of the Secretary
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Reeser:

Thank you for your report on the Department's progress in the preparation of a plan for the distribution of judgment funds awarded the Western Shoshone in Docket No. 326-K before the Indian Claims Commission.

The Indian Judgment Fund Distribution Act of 1973, 87 Stat. 466, provides for a 90-day extension of time in which to submit the Department's plan to the Congress. As a general rule, such extensions are routinely granted upon Departmental request. However, there are several factors which weigh against granting the extension in this case.

It appears that a significant number of Western Shoshone people oppose acceptance of the award at this time. There is pending litigation in the case of *U.S. v. Dann* in the U.S. District Court for the District of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue.

An additional consideration involves the provisions of the 1973 Act itself. The Act provides that a distribution plan must lie before the appropriate Indian committee on both the House and Senate side for 60 working days. There are approximately 40 working days left in this Congress. If an extension was granted the new deadline for submission would be September 14th. It is doubtful such a deadline could be met, but, in addition, it appears a legal issue has been raised with respect to counting days in the present 96th Congress with days in the approaching 97th Congress in order to achieve the necessary 60-day period. This may not be an insurmountable obstacle, but under the circumstances it would appear that this could lead to legal challenges that could further tie up the resolution of this claim and the distribution of the award.

Under these circumstances, it is my conclusion that the extension should not be granted. I trust the Department will submit appropriate legislation early in the 97th Congress.

With best regards,

Sincerely,

John Melcher
Chairman

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 76-492

GUY OSCEOLA,

Plaintiff,

v.

JEROME K. KUYKENDALL, et al.,

Defendants.

MEMORANDUM OPINION

In this action for declaratory and injunctive relief, plaintiff alleges that the Act creating the Indian Claims Commission, 25 U.S.C. §§ 70-70v, is unconstitutional on its face and as applied to plaintiff. The matter first came before the court on plaintiff's motion for a temporary restraining order, which was denied in an order of April 7, 1976.[1] Subsequently, a three-judge court was convened to hear the merits of plaintiff's claim, pursuant to 28 U.S.C. §2284. Now before this three-judge court is defendants' motion to dismiss. Also currently pending is plaintiff's motion for certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 1-13(b) of the local rules of court.

Plaintiff Guy Osceola is an Indian residing in the state of Florida on an unspecified tract of land which he terms

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[1]The court's order denying the temporary restraining order was based on the failure of plaintiff to show that he and his class were in imminent danger of irreparable injury, as is required by *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

part of the "territory of the Seminole Nation." He purports to represent a separate and distinct group of Seminoles known as the Everglades Miccosukee Tribe of Seminole Indians. The complaint alleges that plaintiff is a direct descendant of those Seminole people, members of the Seminole Nation, who have never been militarily defeated, have never signed a written treaty of peace, and have never ceded nor given over their right to freely live upon and utilize their aboriginal territory in what is now known as Florida. The Seminoles whom plaintiff seeks to represent number from one to two hundred persons, many of them living in remote reaches of the Everglades and not speaking English.

Underlying plaintiff's claim is a rather complicated procedural history which begins in 1950, when the Indian Claims Commission received a petition on behalf of the "Seminole Indians of the State of Florida." The petition sought compensation for unfair dealing in the two treaties which resulted in the Indians' relinquishment of Florida and their eventual relocation on an Oklahoma reservation: (1) the 1823 Camp Moultrie Treaty under which the Indians relinquished "all claim or title which they may have to the whole territory of Florida" in return for the promise of a Florida reservation and further consideration totaling $152,500; and (2) the 1832 Treaty of Payne's Landing which relocated the Seminoles from the Florida reservation to the Indian Country in Oklahoma. In 1953 the petition, Docket No. 73 before the Indian Claims Commission, was consolidated with a petition for an overlapping claim by the Seminoles of Oklahoma, Docket No. 151.

The persons filing the 1950 petition claimed to be acting for the Seminole tribal organization, though at that

time there was no such tribal organization recognized by the Secretary of the Interior. Plaintiff in the instant case alleges that those persons acted without authority from the class of Indians which plaintiff seeks to represent. Plaintiff differentiates his claim from that of the Seminoles who filed the 1950 petition by noting that they have requested only money relief, which is apparently the only sort of relief the Indian Claims Commission is empowered to grant. In contrast, plaintiff speaks for a group of Indians now possessing "Seminole land" and desiring to remain in possession of that land.

Fearful that the proceedings before the Indian Claims Commission would somehow affect their interest in the land which they occupy, plaintiff and his predecessors in interest have embarked on an extended, if sporadic, campaign to keep the petitioners in Docket No. 73 from obtaining a judgment from the Commission. In 1954 a group calling itself the General Council of the Miccosukee Seminole Nation filed a "motion to quash" the 1950 petition. That motion was struck from the record in an order of April 8, 1955, by the Indian Claims Commission. On appeal from that action by the Commission, the Court of Claims dismissed the appeal on the ground that the order denying the motion was not a final order and therefore was not appealable. *Billie v. United States*, 146 F. Supp. 459, 137 Ct. Cl. 161 (1956), *cert. denied*, 355 U.S. 843 (1957). In dictum the Court of Claims made comments which appear relevant to the instant suit:

> It seems to be appellant's position that although it is not and does not wish to be a party to the suit, its title to part of the land which is the subject matter of the suit is paramount, and that a decree of the Indian Claims commission establishing the rights of the or-

> iginal parties to that subject matter (land) would work an injustice and irreparable injury on the appellant. If appellant's title to the land which is the subject matter of the suit is indeed paramount, his paramount title will not be affected by the decree of the Commission as to the rights of the original parties since it will not purport to adjudicate appellant's title or right to the land in question.

146 F. Supp. at 461. The same group that filed the motion to quash in 1954 also filed a motion to dismiss the pending petition in 1961; that motion was denied by the Indian Claims Commission on the day it was filed. Plaintiff associates himself and the group he seeks to represent with the group which filed the 1954 and 1961 motions.

On May 8, 1964, the Commission entered an interlocutory order finding that petitioners in Docket Nos. 73 and 151 had established "Indian title" to all of the present state of Florida with the exception of certain limited areas which had been disposed of by the Seminoles prior to 1823. That ruling was affirmed by the Court of Claims in *United States v. The Seminole Indians*, 180 Ct. Cl. 375 (1967). The Commission made a final award of $13,262,780.63 on October 22, 1970. The United States appealed the award to the Court of Claims, and the Court of Claims remanded the case to the Commission for more specific findings and reasonings as to the value of the land involved. *Seminole Indians v. United States*, 455 F.2d 539, 197 Ct. Cl. 350 (1972).

After negotiations and approval by all the parties, a joint motion for entry of a final judgment in the amount of $16,000,000 was filed with the Commission on March 1, 1976. The Commission held a hearing on that motion March 26, 1976. Plaintiff contends that he and the

members of his proposed class received no formal notice of the hearing and had no opportunity to be heard and that the hearing was held in violation of the Commission's own rules regarding the scheduling of such hearings. Thus the hearing is said to violate plaintiff's rights to due process of law. Plaintiff further alleges that his due process rights were infringed by inadequate notice concerning a meeting which was held January 22, 1976, at Hollywood, Florida, for the purpose of discussing the proposed settlement.[2]

As the petitioners' claim slowly made its way toward final judgment, yet another group of Seminoles appeared before the Commission seeking to be heard. In 1968, a group called the Miccosukee Tribe, federally recognized since 1962, filed a motion to intervene in the proceedings before the Commission. The motion was denied on the ground that the proposed intervenor was already adequately represented by the original petitioners; no appeal was taken from that denial. Plaintiff and his group are not members of the federally recognized Miccosukee organization, and they disavow that organization's attempt to share in any monetary settlement of the claim before the Commission. Similarly, the federally recognized Miccosukees disclaim any association with plaintiff and his predecessors in interest who have sought to have the Commission's consideration of the Seminole land claim. In its 1968 motion to intervene in the Commission proceedings, the federally recognized Miccosukee Tribe referred to the

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[2] In its findings of fact concerning the compromise settlement of $16,000,000, issued April 27, 1976, the Indian Claims Commission found that the notice for the January 22, 1976, meeting had been adequate.

1954 motion to quash as "ill-advised" and to the 1961 motion to dismiss as filed "by a lawyer unauthorized to act on [the Miccosukees] behalf."

Plaintiff's primary concern in this suit for declaratory and injunctive relief is that his property rights and those of the Indians he represents will be undermined by the adjudication before the Indian Claims Commission—an adjudication in which they have been denied effective participation. In an attempt to bar the entry of a final judgment by the Commission, plaintiff argues that the entire statutory scheme of the Indian Claims Commission Act, 25 U.S.C. §§70-70v, operates to deprive him and his proposed class of the due process of law guaranteed by the fifth amendment. The alleged constitutional violation springs from the Commission's adjudication of plaintiff's property rights without notice and opportunity to be heard and without opportunity to exclude himself from the effects of a judgment. More specifically, plaintiff contends that §70i of the Act is unconstitutional because it delegates to the Secretary of the Interior the authority to determine without appropriate standards, who may proceed as a tribal representative before the Indian Claims Commission. Plaintiff also alleges, as a secondary matter, that the Act deprives him and his proposed class of the equal protection of the law since it requires Indians to assume heavier burdens than other racial or ethnic groups in the assertion and protection of their property rights.

Stripped to its bare essentials, plaintiff's claim is that he and his group hold "Indian title" to the land on which they reside by virtue of their aboriginal possession of it—a possession which continues to this day. Plaintiff contends that this Indian title was not disturbed by the treaties of

1823 and 1832 because his ancestors were not allowed meaningful participation in those agreements and that, in fact, his ancestors' rights in the land were recognized by the United States in an oral treaty of 1842. Defendants' motion to dismiss is based primarily on the arguments that the property rights claimed by plaintiff are not protected by the Fifth Amendment because Congress has never recognized any Indian rights in the disputed land and that, in any event, any rights which plaintiff may have in the subject territory will be unaffected by the award of the Indian Claims Commission which is sought to be enjoined by this suit.[3]

Resolution of this conflict requires examination by the court of the concept of original Indian title,[4] a legal doctrine dating from the opinion of Chief Justice Marshall in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823). In that case the Supreme Court indicated that the sovereign

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[3]In their motion to dismiss, defendants have argued that this court lacks jurisdiction over plaintiff's claim and that plaintiff should take his case to the Court of Claims. Such an argument ignores the fact that plaintiff seeks an injunction and a declaratory judgment, relief which the Court of Claims is not empowered to grant. *See United States v. King,* 395 U.S. 1 (1969). Plaintiff's claim is clearly one "arising under" the Constitution and laws of the United States, and this court thus has jurisdiction over it pursuant to 28 U.S.C. § 1331.

[4]The law of Indian title prior to the decision of the Supreme Court in *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955), is examined in Cohen. "Original Indian Title," 32 Minn. L. Rev. 28 (1947). *See also* "The Supreme Court, 1954 Term," 69 Harv. L. Rev. 119, 147-51 (1955). Note, "Systematic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs," 57 Iowa L. Rev. 1300, 1304-06 (1972): Comment, 26 Rutgers L. Rev. 909, 913-16 (1973).

held exclusive title to all aboriginal Indian lands, subject to a right of occupancy in the Indians still residing there. Thus the Indian title claimed by plaintiff cannot be a fee simple absolute as the use of the term "title" might imply; rather, if plaintiff in fact holds Indian title to the subject territory because of continued possession since aboriginal times, that Indian title conveys no more than a right to use and occupy the land at the will of the United States.

The relatively narrow view of Indian property rights embodied in *Johnson v. M'Intosh* was reaffirmed in *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955), the most recent case in which the Court has fully considered the question of Indian title. The Tee-Hit-Tons, an Alaskan Indian tribe, argued that their rights under the Fifth Amendment were violated by the refusal of the United States to compensate them for a taking of timber from land allegedly owned by the tribe. Like plaintiff in this case, they contended that their "tribal predecessors have continually claimed, occupied and used the land from time immemorial." *Id.* at 277. The government urged that the Indians had no compensable interest in the land because Congress had not recognized any property right in the Indians. The Supreme Court accepted the government's argument, holding that congressional recognition of Indian property rights "may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-79.

With respect to the Tee-Hit-Tons' claim of aboriginal title arising from the tribe's longstanding occupation of the territory in question, the Court said:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty", as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

After a review of the prior cases which were considered relevant to the facts presented in *Tee-Hit-Ton*, the Court added:

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, but not because of legal liability.

Id. at 281-82. The court concluded that the taking by the government was not compensable "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." *Id.* at 285.

Clearly emerging from the holding of the Court in *Tee-Hit-Ton* are several principles which have a direct bearing upon this case: (1) fee title to the Indians' aboriginal land is vested in the United States even if an Indian tribe can claim that it originally held Indian title to the land; (2) any right which Indians of today have in such former Indian territory is a mere right of possession or occupancy, subject at any time to taking or extinction by Congress; and (3) recovery for past wrongs to the Indians who were deprived of their lands is a matter of legislative grace rather than legal liability on the part of the United States. Harsh as these rules may seem, they remain the law applicable to plaintiff's claim. In a much more recent decision than *Tee-Hit-Ton*, the Court noted in dictum the salient aspects of the law of Indian title:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. . . . Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

Assuming *arguendo* that plaintiff could demonstrate that he and his group hold Indian title to the land in question, the most which that Indian title could give him, under numerous decisions of the Supreme Court,[5] is a right to

[5]See cases discussed in Cohen, "Original Indian Title," 32 Minn. L. Rev. 28 (1947).

possession and occupancy. Regardless of the judgment entered in Docket Nos. 73 and 151 by the Indian Claims Commission, plaintiff's right to possess the land may be terminated at any time by the United States. The decision by the Commission represents its finding that the Seminoles held Indian title to most of the state of Florida prior to the 1823 treaty and that the compensation which they received for ceding that land to the United States was inadequate. The judgment in Docket Nos. 73 and 151 is a means of providing additional compensation to the Seminoles' descendants—compensation granted by Congress as an act of legislative grace. Entry of the judgment will create no new property rights in the United States, for the United States already holds fee simple title to the land, subject only to any rights of possession which plaintiff and others like him may have.[6] Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment.

Since plaintiff's claim of Indian title gives him nothing more than a mere right of possession of the land, it is difficult to see how plaintiff could assert a cause of action against the Indian Claims Commission or any other agent of the United States until that possession is disturbed. Plaintiff's complaint clearly indicates that he and his

[6]The *Tee-Hit-Ton* Court held that ownership vested in the United States by virtue of its conquest of the Indians:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 348 U.S. at 279. Defendants in this case argue that the United States holds title based on the Seminoles' cession of the territory under the treaties of 1923 and 1932. Under either theory, it is clear that fee simple title to the land in question is now in the United States.

group remain in possession of the land to which they claim Indian title. Furthermore, counsel for defendants represented to the court during oral argument that the United States contemplated no action of any sort against plaintiff or his class.[7] Under such circumstances, the court must conclude that plaintiff's complaint is premature. Plaintiff's possessory rights, which are the only rights available to him under a claim of Indian title, are not presently threatened, and they may never be. As one commentator has observed "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." K. Davis, *Administrative Law Text* 396 (3d ed. 1972). *See International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954).

If in the future plaintiff's possessory interest is challenged, his claim of Indian title may become ripe for judicial consideration. At that time he may be able to establish that he and the group he represents hold Indian title to their land by showing "actual, exclusive, and continuous use and occupancy 'for a long time'" prior to the challenge. *Sac & Fox Tribe v. United States*, 315 F.2d 896, 903, 161 Ct. Cl. 189, 201-02, *cert. denied*, 375 U.S. 921 (1963). If Indian title is proven, then the right of occupancy can be extinguished only by "plain and unambiguous" act of Congress. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346-47 (1941). When the right of occupancy is so extinguished, no compensation is available to the Indians

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[7]This representation was made during oral argument on plaintiff's motion for a temporary restraining order in April 1976. Ostensibly nothing has happened since that time to change the government's position.

unless their Indian title has been "recognized."[8] *Tee-Hit-Ton Indians v. United States, supra*, 348 U.S. at 281-85. And such recognition, like extinguishment of Indian title, must be by unequivocal act of Congress:

> Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive "recognition" is insufficient, as is a simple acknowledgment that Indians lived in a certain region. There must be an intention to accord or recognize a *legal* interest in the land.

Sac & Fox Tribe v. United States, supra, 315 F.2d at 897.

Eventually plaintiff may be required to prove certain of the allegations of his complaint in order to protect his rights against interference by the United States or third parties.[9] For the present, however, the most he claims is

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[8]Plaintiff relies upon *Mitchel v. United States*, 9 Pet. 711 (1835), for the proposition that the Seminoles held recognized, treaty-guaranteed title to their Florida land. Defendants content that *Mitchel* is inapposite to the instant case because it dealt with the narrow issue of title to a specific tract of land. The court need not consider at this time the impact of the *Mitchel* holding upon plaintiff's rights since any claim which plaintiff might have is not yet ripe. In light of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and other cases subsequent to *Mitchel*, it appears that the question of whether plaintiff's right of occupancy is recognized by treaty would arise only upon extinguishment of that right by the United States and then only in order to determine whether plaintiff was entitled to compensation.

[9]If plaintiff's claim of recognized Indian title should become ripe at some future time, the appropriate forum in which to assert that claim would be the Court of Claims rather than federal district court. The Court of Claims has jurisdiction over such actions by the terms of 28 U.S.C. § 1505, which provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13,

(Continued on following page)

recognized Indian title and the most to which he would be entitled under that claim is a right of possession and perhaps of compensation should that possession be disturbed in the future.[10] It is undisputed that plaintiff is currently in possession of the land and that the United States has no impending plans to contest that possession. Thus, plaintiff's complaint sets forth no concrete or current controversy and must be dismissed for failure to state a claim upon which relief can be granted.

(Continued from previous page)

1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

[10]Plaintiff attempts to avoid the holding of the *Tee-Hit-Ton* case by noting that there the Indians' rights were extinguished by Congress, as it clearly has the power to do, whereas here it is the members of the Indian Claims Commission who threaten an "unconstitutional taking or interference" with Indian land. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 12. The court, however, does not believe that there has been an interference with any right possessed by plaintiff. In any event, the comments of the *Tee-Hit-Ton* Court concerning the nature of Indian title remain unaffected by the distinction which plaintiff seeks to draw between his case and that of the Tee-Hit-Tons.

In the alternative, plaintiff suggests that the court consider the *Tee-Hit-Ton* decision to have been overruled by subsequent cases such as *Goldberg v. Kelly*, 397 U.S. 337 (1969), which establish rights of procedural due process under the fifth amendment. Those cases are not relevant to the issues raised in *Tee-Hit-Ton*, and the continuing validity of the *Tee-Hit-Ton* view of Indian title is clearly suggested by the Court's remarks in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974).

An appropriate order accompanies this memorandum opinion.

/s/ Malcolm R. Wilkey
UNITED STATES CIRCUIT JUDGE

/s/ Joseph A. Waddy
UNITED STATES DISTRICT JUDGE

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

AMICUS CURIAE

BRIEF

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No. 83-1476

In The
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,
Petitioners,

vs.

MARY DANN and CARRIE DANN,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON BEHALF OF AMICUS CURIAE WESTERN SHOSHONE NATIONAL COUNCIL, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1951, the Temoak Bands filed a petition before the Indian Claims Commission (Docket 326-K) seeking compensation for the extinguishment of title to Western Shoshone lands. Mary and Carrie Dann consistently opposed Docket 326-K as a threat to their right to occupy ancestral Western Shoshone lands. The Court of Claims denied motions to delete such lands from Docket 326-K or to stay the proceedings until title could be determined. Final judgment was rendered on December 6, 1979. Funds to pay the judgment were appropriated, and a treasury account was established in the name of the Temoak Bands.

In 1974, the United States sued to enjoin the Danns from using lands continuously occupied by the Dann Band from time immemorial. The Danns answered that Western Shoshone title remains unextinguished. The district court held that, while the Indian title had never been previously extinguished, the Docket 326-K judgment itself extinguished title. The Court of Appeals reversed, holding that the mere appropriation of funds does not constitute "payment" under Indian Claims Commission Act Section 22(a) which would preclude the Danns' position.

Under these circumstances, does the mere appropriation of funds to pay a judgment enable the United States to invoke the discharge provision of Section 22(a) to eject Mary and Carrie Dann from otherwise unextinguished Western Shoshone lands?

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BRIEF ON BEHALF OF AMICUS CURIAE WESTERN SHOSHONE NATIONAL COUNCIL, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The tribal governments and organizations joined herein file this brief *Amicus Curiae* in opposition to the Petition for Certiorari of the United States pursuant to Rule 36.1 of the Supreme Court Rules.

This brief is submitted with the written consent of all parties to the case lodged with the clerk.

INTEREST OF AMICUS

The Western Shoshone National Council consists of representatives from all nine federally-recognized Western Shoshone tribal governments[1], the Dann Band of Western Shoshone Indians, and certain Western Shoshone political organizations. The membership of the Western Shoshone National Council includes the Duckwater Shoshone Tribe, the Temoak Bands Council, the Western Shoshone Sacred Lands Association, the Dann Band of Western Shoshone Indians, the Battle Mountain Community Council, the Elko Community Band Council, the Ely Colony Council, the South Fork Band Council, the Timbisha (Death Valley) Shoshone Tribe, the Wells Band Council and the Yomba Shoshone Tribe. The Western Shoshone National Council is a modern continuation of an ancient, traditional council which integrated the Western Shoshone Nation as a whole.

Several of the above-named entities occupy, in the same manner as Mary and Carrie Dann, a total of approximately three million acres of Western Shoshone aboriginal lands in Nevada presently administered by the federal government. The purpose of the National Council is to defend and advocate the land rights of the Western Shoshone Nation. The Western Shoshone National Council joins as *amicus curiae* because the final outcome in this case will impact upon the National Council's efforts to protect Western Shoshone land rights.

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1. There are at least 21 separate, federally-recognized Indian tribes (bands) in Nevada, Oregon and California which include Western Shoshone Indians in their membership. *Western Shoshone Identifiable Group v. United States*, 652 F.2d 41, 42 (Ct. Cl. 1981). The Dann Band is an additional, tribal entity. Of these, nine federally-recognized bands and the Dann Band are predominantly Western Shoshone.

STATEMENT

The proceedings in the case at bar and in *Western Shoshone Identifiable Group, Represented by the Temoak Band of Western Shoshone Indians v. United States*, 652 F.2d 41 (Ct. Cl. 1981) (hereinafter Docket 326-K)[2] are interrelated and are exceedingly complex.

At the outset, it is important to understand who the various entities are, which of them ar .eal, and which are mere inventions of the attorneys. Tn "Western Shoshone Identifiable Group", named as plaintiff in Docket 326-K, is a non-existent entity invented by the claims attorneys for the caption of the case. The Temoak Bands Council is but one of the twenty-two bands,[3] which are wholly or in part Western Shoshone. The "General Council of the Western Shoshone Bands of the Shoshone Tribe of Indians" was a politically-unorganized mass meeting of Western Shoshones held in Elko, Nevada on June 1, 1947 which allegedly authorized the Temoak Bands to hire

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2. As originally filed, Docket 326-K was styled *Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States* (Docket No. 367), *See*, 11 Ind. Cl. Comm. 387 (1962). It then became *Western Shoshone Identifiable Group represented by the Temoak Bands of Western Shoshone Indians, Nevada v. United States. See*, 29 Ind. Cl. Comm. 5 (1972). Subsequent proceedings were styled *Western Shoshone Legal Defense and Education Association and Frank Temoke v. United States and the Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians, Nevada*, 531 F.2d 495 (Ct. Cl. 1976), and *The Temoak Band of Western Shoshone Indians, Nevada v. United States and the Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Indians, Nevada*, 593 F.2d 994 (Ct. Cl. 1979). The various captions are reflective of the turmoil in which the litigation was embroiled almost from its inception as the Western Shoshones, supposedly represented by the Temoak Bands, struggled to prevent the proceedings from impairing title to their lands.

3. This count includes the Dann Band.

claims attorneys. Memorandum of the Duckwater Shoshone Tribe, et al. in Opposition to the Motion and Petition for Attorney's Fees and Expenses in Docket 326-K at 45. The "Western Shoshone Claims Committee" was a group of eight individuals from various Western Shoshone districts appointed at four mass meetings in 1965 by the claims attorneys. 652 F.2d 41, 44 (Ct. Cl. 198[illegible]). Although the Temoak Bands was determined to be the "exclusive representative" of all Western Shoshones by the Indian Claims Commission,[4] a political entity even arguably representative of more than a small minority of all Western Shoshones did not exist.

In 1863, the United States entered into the Treaty of Ruby Valley with the Northern Bands of Western Shoshone Indians. The treaty is one of peace and friendship. It specifies the boundaries of certain Western Shoshone lands, but does not cede title to any of those lands, although it does grant the United States certain rights-of-way, a license to explore for and produce minerals, and other supporting rights.[5] Congress has never abrogated or altered the Treaty of Ruby Valley.

In 1948, the Commissioner of Indian Affairs approved a contract between the Temoak Bands and certain claims attorneys. This contract was controlled and extended from time to time by the Secretary of the Interior and the Commissioner of Indian Affairs pursuant to 25 U.S.C. Sections 70n and 81. 652 F.2d 41, 45 (Ct. Cl. 1981). The

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4. Nonetheless, the Court of Claims noted that the Duckwater Shoshone Tribe was not actually a party to the proceedings in Docket 326-K. *Western Shoshone Identifiable Group v. United States*, 652 F.2d 41, 43 (Ct. Cl. 1981).

5. 18 Stat. 689 (1866).

Temoak Bands' attorneys were at all times subject to the supervision of agents of the defendant United States (plaintiff here). *Id.* at 43. The contract expired in 1968, and was never renewed by the Temoak Band. It was, however, extended in 1968, 1970, 1972, 1974, 1976, and 1978 by agents of the United States, despite the formal termination of the attorney-client relationship by the Temoak Band in 1976.

In 1951, the claims attorneys filed a petition before the Indian Claims Commission on behalf of the "Western Shoshone Identifiable Group" seeking compensation for the extinguishment of Western Shoshone aboriginal title by the United States. Nonetheless, the majority of Western Shoshones have always believed that title to their lands was never extinguished by the United States, and have always wanted to keep their lands. *Id.* at 45. The Temoak Bands did not initially object to the Docket 326-K proceedings because they were repeatedly assured by the claims attorneys and the Bureau of Indian Affairs, even prior to the filing of the petition, that the proceedings would have no effect whatsoever on Western Shoshone title or possessory rights, and would be for the purpose of enforcing the Treaty of Ruby Valley. Duckwater Memorandum, *supra*, at 24-52.

Western Shoshone opposition to Docket 326-K and the claims attorneys grew steadily from 1951 on. Today, all Western Shoshone tribal governments and political entities are united in the position that title to Western Shoshone lands has never been ceded or extinguished and they retain possessory rights. This does not represent in any sense a change in position or litigation strategy. Rather, it represents full understanding by the Western

Shoshones of the significance of the proceedings in Docket 326-K, a comprehension which has developed despite decades of misinformation from the Bureau of Indian Affairs and the claims attorneys.

Although it was named as the representative of the "Western Shoshone Identifiable Group" in the Docket 326-K proceedings, the Temoak Bands Council never controlled that litigation or their attorneys.[6] Initially, the Temoak Bands Council was misinformed about the nature of Docket 326-K. After 1965, when the Western Shoshone Claims Committee was created, the claims attorneys ceased to communicate with their client, the Temoak Bands Council. In a January 19, 1977 letter to the Interior Secretary, Leslie Blossom, Temoak Bands Chairman stated:

> There are many strange things about the way these lawyers have operated. They no longer report to us but to a "claims committee" which was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the lands we still have, but have fought our people who have tried to do it themselves through the Western Shoshone Legal Defense and Education Association.

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6. The efforts of the Temoak Bands Council to fire the claims attorneys, take control of the case, and stay the proceedings pending a genuine determination of title resulted, in effect, in the Temoak Bands being fired as plaintiff. In *The Temoak Band of Western Shoshone Indians, Nevada v. the United States and the Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Indians, Nevada,* 593 F.2d 994, *cert. denied,* 444 U.S. 973 (1979), the Temoak Bands finds itself both plaintiff and defendant. The United States opposed the stay as an apparent co-defendant, and the terminated claims attorney contended he could not be fired by the Temoak Bands because the defendant United States had to approve, and besides he was actually representing someone else (the "Western Shoshone Claims Committee") 652 F.2d 41, 45-46.

> We have now fired these lawyers and are looking for a replacement.

Western Shoshone Identifiable Group v. United States, 652 F.2d 41, 46 (Ct. Cl. 1981). The claims attorneys refused, however, to be fired, and prosecuted the claim to judgment with no client.[7]

Three attempts have been made to call the attention of the Court of Claims to the fundamentally erroneous premise of extinguishment on which Docket 326-K proceeded,[8] to the egregious due process problems which pervaded Docket 326-K, and to the collusion and fraud practiced by attorneys for both parties. These were the 1974 Motion of the Western Shoshone Legal Defense and Education Association for a stay, which was denied by the Indian Claims Commission and the Court of Claims, 35 Ind. Cl. Comm. 457 (1975), 531 F.2d 495 (Ct. Cl. 1976), *cert. denied,* 429 U.S. 885 (1976); the several motions of the Temoak Bands Council for a stay of Docket 326-K filed in 1976 and 1977, likewise denied by the Indian Claims Commission and the Court of Claims, 40 Ind. Cl. Comm. 304 (1977), 593 F.2d 994 (Ct. Cl. 1979), *cert. denied,* 444 U.S. 973; and the filing by the Duckwater Shoshone Tribe, et al. in opposition to the claims attorneys' petition for fees, also denied by the Court of Claims. 652 F.2d 41 (Ct. Cl. 1981).

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7. Although he purported by then to be representing the "Western Shoshone Claims Committee", his contract had always been with the Temoak Bands Council.

8. The Court of Claims has acknowledged that it was unable to discover any formal extinguishment of Western Shoshone legal title, and could not establish a date of taking. 593 F.2d 994, 996 (Ct. Cl. 1979).

REASONS FOR DENYING PETITION

I.

Review is unnecessary because Congress will legislate as to Western Shoshone title and distribution of the judgment fund.

At the time of the final judgment of the Court of Claims in Docket 326-K, 25 U.S.C. Section 1402(a), Pub. L. 93-134, 87 Stat. 466 (1973) required that the Secretary of the Interior submit a plan to Congress for the distribution of the fund within 180 days after appropriation of funds to pay the judgment, or submit proposed legislation. 25 U.S.C. Section 1402(b) allows the Secretary of the Interior to obtain a maximum 90-day extension to submit a plan or proposed legislation by request to the Senate and House of Representatives Committees on Interior and Insular Affairs. When the Secretary requested an extension in Docket 326-K, it was denied. Respondents' Brief in Opposition, Appendix A. Consequently, legislation specifying the manner of distribution of the judgment fund is required. Once Congress has enacted such legislation, actual payment of the judgment will be merely ministerial, and the payment issue will be moot.

The Senate Report on the 1982 amendments to the Distribution of Judgment Funds Act, 25 U.S.C. Section 1401 *et seq.*, identifies the Western Shoshone judgment as requiring legislation. S. Rep. 97-658, 97th Cong., 2d Sess. 3 (1982). Criteria employed by the Interior Department in identifying the Western Shoshone judgment as requiring legislation included the pending *Dann* case and strong feelings among Western Shoshones that there should be a land settlement. *Id.* at 4. Thus, both Congress and the Interior Department recognize the necessity of legislation to resolve the Western Shoshone

problem. The Interior Department has agreed to negotiate with the Western Shoshones to arrive at a mutually acceptable legislative draft. *See* Appendix A hereto. The question presented by Petitioner here is a narrow one of statutory interpretation. The outcome is largely immaterial to Congress in its prospective legislation. If this Petition is denied, a legislative resolution could well occur even before the completion of proceedings on remand to the district court.

II.

The decision of the Court of Appeals is interlocutory and review is premature.

The Court of Appeals remanded this case to determine whether Western Shoshone title was preserved to the date of trial and whether the Danns are entitled to share in it. 706 F.2d 919, 933.

The question presented by the government is much broader than the scope of the Court of Appeals decision. The Ninth Circuit held only that the Danns are not barred by Section 22 from asserting aboriginal title as a defense to the claim of trespass because "payment" has not occurred. Petitioner now asks this court to decide not only that "payment" was made, but that "payment" precludes the Danns from asserting their possessory rights to Western Shoshone land. It is far from clear that the statute operates against the Danns under the circumstances, and this issue was not decided by the Court of Appeals. Petitioner is improperly requesting this Court to rule on an issue as yet undecided by the lower courts.

Section 22(a) provides that . . . "payment of any claim . . . shall be a *full discharge* . . . of all claims and demands

touching any of the matters involved in the controversy." (Emphasis supplied). The Court of Appeals held, and Petitioner does not now dispute, that the discharge effect of Section 22 is exclusive of common law preclusion doctrines. Whether the Danns are precluded from exercising their possessory rights must therefore be determined by the terms of the statute. Since the Court of Appeals concluded that "payment" within the meaning of the statute has not occurred, it did not reach the issue of the effect of "payment" on the Danns.[9]

III.

There is no compelling reason for Supreme Court review.

A. One reason the Supreme Court may grant review is that important statutory issues are presented. That is not the case here.

Petitioner would have this court believe that whether an automatic appropriation of funds to pay the judgment in Docket 326-K has raised a statutory bar[10] pursuant to Section 22 is an important question of statutory construction. The Petition states "[w]e believe there are some outstanding judgments funds in cases where the claimant may wish to disavow a finding of extinguishment of abor-

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9. While the Ninth Circuit discussed the issues of whether the Danns are in privity with the plaintiff in Docket 326-K, and whether their defense to this action is the same "claim" as that involved in Docket 326-K in footnotes 3 and 4, respectively, in the context of the common law preclusion doctrines of collateral estoppel and res judicata, it is clear that both issues must be separately resolved with respect to the application of Section 22. Moreover, the Court of Appeals did not determine the meaning of "discharge" as used in the statute.

10. It should be noted that the statute itself refers only to a "full discharge" of the United States not a "bar". A "discharge" ordinarily refers only to liability for money damages, and could not constitute a bar to the assertion by the Danns

(Continued on following page)

iginal title and seek a land settlement." Pet. at 25. Petitioner's failure to make reference to even one such case confirms that its "belief" is mere speculation. In fact, there is no other litigation in which "payment" and the affect of Section 22 are at issue. While a significant number of judgments in cases litigated under the Indian Claims Commission Act will require legislation to accomplish distribution, none are in litigation and none involve the effect of the statutory discharge. See Appendix B.

It is not appropriate for this Court to grant review on the speculative basis that the issue of whether "payment" has occurred and triggered some sort of preclusion might arise somewhere, sometime in the future. Moreover, the circumstances of the Dann case and the issues which it presents are so unique and so complex that the likelihood of the same, or even arguably similar issues arising in such a way as to require Supreme Court review is extremely unlikely.[11]

B. Petitioner has not asked this Court to determine whether Western Shoshone title was actually extinguished. Instead, Petitioner simply seeks to preclude Mary and Carrie Dann from asserting their possessory rights to Western Shoshone lands for highly technical reasons. Since

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(Continued from previous page)

of possession as a defense to what is, in effect, an action in ejectment.

11. Of the more than 600 separate claims filed with the Indian Claims Commission, the Commission had disposed of 546 by dismissal or award by the time it went out of existence on September 30, 1978. U.S. Indian Claims Comm'n, *Final Report*, p. 125 (1978). Fewer than 70 claims remained pending on that date, many of which were accounting and other non-land-related claims. *Id.* at 20. At present, only about 30 claims remain, and settlements are pending in many of those. (Personal Communication with the Indian Claims Section of the Justice Department.) Section 22 no longer even appears in the current West edition of Title 25, United States Code.

Petitioner is not challenging the Court of Appeals' conclusion that Western Shoshone title was never extinguished, it must be concluded that Western Shoshone title remains unextinguished. A decision in favor of Petitioner on the question presented here will simply complicate the situation.

The thrust of Petitioner's request for review seems to be that a negative answer to the question presented will lay to rest the multifarious Western Shoshone land issues, clear title to private and federal lands in Nevada and prevent further litigation; whereas, in fact, a decision for Petitioner will leave innumerable collateral issues unresolved, and will not prevent further litigation between any number of individuals and entities whose rights are affected by unextinguished Western Shoshone ancestral title. The cloud on private titles within the Western Shoshone ancestral territory will remain. The Western Shoshones will be free to initiate quiet title and ejectment actions against certain private parties. The Western Shoshones may have a large claim for mineral royalties against the various resource companies who have operated on unextinguished Western Shoshone title lands. *See, Temoak Band v. United States*, 593 F.2d 994, 1001 (1979).

It appears that the sole objective of Petitioner in seeking review is to reduce the technical force of the Western Shoshone position before Congress. Unavoidably, however, Congress mut act to deal with the Western Shoshones. Congress has the power to extinguish Western Shoshone title. *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). The only question is whether Congress will be confronted with a plainly unextinguished Western Shoshone title, or with a confusing situation even further confused by a decision of this Court.

IV.

The judgment in Docket 326-K has not been paid.

A principal thrust of the government's argument in favor of this Court hearing this case is its contention, Pet. at 14-17, that the Court of Appeals' interpretation of Section 22 is "plainly erroneous." Even were the meaning of this by now largely obsolete statute[12] a question worthy of this Court's attention, and even were the resolution of that question at all dispositive of the outcome of this case[13], the government's strained argument on this point fails utterly.

Section 22(a) (including the relevant portion omitted by the government), reads, in pertinent part,

> When the report of the Commission . . . has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, *and there is authorized to be appropriated such sums as are necessary to pay* the final determination of the Commission.
>
> The payment of the claim . . . shall be a *full discharge* of the United States of all claims and demands touching any of the matters involved in the controversy.

(Emphasis supplied).

The government's entire argument is that appropriation of the funds equals "payment" for purposes of the second paragraph of the quoted passage. The first paragraph, however, and the realities of the payment process demonstrate conclusively that appropriation of the funds

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12. See fn. 11, *supra*.

13. As noted elsewhere, numerous questions remain open and undecided as to whether the discharge provision of Section 22 applies to any issue in this case at all, *ante* at fn. 9.

"necessary to pay" the judgment is merely the first step in the payment process. That process consists of several steps: (1) appropriation of the funds; (2) development and approval of a plan for distribution of the funds; (3) identification of the individuals and entities to whom payment is to be made under the approved plan; and (4) actual issuance of checks. Under the procedure now applicable to all judgments against the United States, appropriation of the funds could occur at any time prior to actual payment. It could even occur after the plan has been approved and the beneficiaries identified. However, under 31 U.S.C. Section 724a, the funds are automatically appropriated soon after the judgment becomes final. There is nothing magical about the appropriation of the funds, as opposed to some other step in the payment process, that even justifies, much less compels, the conclusion that Section 22(a) operates at that point.

The government endeavors to show a fundamental inconsistency in the notion that "payment" occurs *after* the funds have been appropriated by contending that upon their deposit in an account identified to the claim judgment, the funds are held in trust.[14]

But this is a distinction without a difference. The inquiry must be, at what point has the United States satisfied its liability to the claimants by paying them the money to which they are entitled, such that it is appropriate to invoke the discharge provision of Section 22. If, as the

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14. When members of the claimant group in a very similar Ind. Cl. Comm. case complained that they and about 1,000 others had been left out of the distribution of the judgment fund for that claim, the United States urged, successfully, that it had *no* trust responsibilities as to management or distribution of that fund. *Whiskers v. United States,* 600 F.2d 1332 (10th Cir. 1979), *cert. denied,* 444 U.S. 1078 (1980).

government contends, merely moving the funds from one account to another on the government's ledger books is sufficient, the Indians have been hoodwinked again, for there is no guarantee that anyone in particular, or anyone at all, will actually see that money, until Congress determines how and to whom it is to be paid.

The fact that the payees of the Western Shoshone judgment fund have yet to be determined further undermines the government's contentions. Congress has relatively broad power to determine who should share in such a fund. *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73 (1977). In this instance, for example, Congress could decide that only Shoshones enrolled in a federally-recognized tribe would be entitled to a share, with the result that the Danns, respondents herein, would get nothing. Until the payees are ascertained, no one has any vested property rights in the fund which are protected by the Fifth Amendment. *Id.* at 85. That the appropriated money may be referred to as "tribal property" in some sense merely reflects that the funds have been segregated from other funds held in the Treasury, and identified as payment for the particular claim; they cannot be used for any other purpose. But "payment" of those funds cannot occur until the payee is known, and that requires the further steps of adoption of a distribution plan and identification of the persons entitled to share in the fund under the plan.

Nor is there any analytical difficulty with the proposition that the funds, though not yet "paid" within the meaning of Section 22, may be held in trust. The funds have been identified for payment of the claim, and it is reasonably assumed that if they are paid out at all they will be paid to Western Shoshone tribes or individauls.

Rather than leave the fund in legal limbo, it is appropriate to charge the government with fiduciary responsibilities (such as the obligation to earn interest) pending payment.

The government goes to great lengths, Pet. at 17-22, to refute the idea that Congress intended to reserve to itself a "final look" at awards under the Indian Claims Commission Act. This is a straw man that purposely distorts the Court of Appeals' ruling. The court below did not say that Congress intended to have a final look "at the merits of the underlying claim," as the government puts it, Pet. at 17; rather, the "look" referred to is directed at the distribution plan; Congress must either let the Secretary's plan take effect, if it is timely, or it must legislate one. The Court's point was that since Congress has blocked the Secretary's plan, and legislation to distribute a judgment fund could take years to adopt, "the ordinary meaning of 'payment' does not seem satisfied by a transfer of funds that leaves such significant legal blocks in the way of delivery to the payee." 706 F.2d at 926. The government fails to address this compelling observation, and its gross mischaracterization of the "final look" language is totally beside the point.

V.

Petitioner is estopped to prevail by equity.

The United States should be estopped to prevail in this case by application of the doctrine of judicial estoppel. The doctrine of judicial estoppel is intended to prevent the unseemliness of a party playing fast and loose with the courts and to protect the integrity of the judicial process by preventing the use of intentional self-contradiction as

a means of obtaining an unfair advantage by one party over another. *Scarano v. Central Railroad Company,* 203 F.2d 510, 513 (3rd Cir. 1953). This case presents an egregious example.

In *Osceola v. Kuykendall,* 4 ILR 80 (D.D.C. 1977), the position of the plaintiff was remarkably similar to that of the Danns here. A group of Seminole Indians in possession of Seminole ancestral lands brought a constitutional challenge to the Indian Claims Commission Act on the grounds that their property rights were being undermined by a proceeding before the Commission wherein other Seminoles sought compensation for a taking by the United States of those same lands. The plaintiff, like the Danns, was denied any effective participation in the Indian Claims Commission proceedings despite repeated attempts. The case was dismissed on the grounds there was no case or controversy, based upon the representation of counsel for the United States that no action against the plaintiff threatening his possessory rights was contemplated, and the proceedings in the Indian Claims Commission would have no effect on those rights. The court agreed.

Having successfully defeated this important challenge to unconstitutional proceedings under the Indian Claims Commission Act by assuring the Court that the plaintiff's rights would be unaffected by a final judgment, the United States seeks to eject the Danns' on the basis of an identical judgment in a virtually identical situation. This kind of conduct by a party litigant is an evil which courts should not tolerate. *Scarano v. Central Railroad Company, supra.*

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CONCLUSION

The issues raised by the proceedings in and the relationship between *United States v. Dann* and Docket 326-K are extremely complex and probably unique in American jurisprudence. In creating the Indian Claims Commission, Congress intended to provide a forum and a remedy for ancient wrongs done by the United States to Native Americans. A mistake was made in Docket 326-K; Western Shoshone title was never legally extinguished. The Court of Claims abrogated its judicial responsibilities by approving counsel's assumption of extinguishment and by inventing an unprecedented doctrine to explain it; "the gradual encroachment of white settlers and others. . . ." 11 Ind. Cl. Comm. 387, 416 (1962). The government is now trying to turn the mistake into reality and, in effect, to literally defraud the Western Shoshone Indians. The Docket 326-K proceedings, and the application which the United States seeks of the statutory discharge provision to abrogate the Western Shoshones' possessory rights to their lands makes a mockery of modern concepts of due process of law.

If certiorari is granted here, it will be necessary for this Court to examine the totality of the proceedings in *Western Shoshone Identifiable Group* and *Dann* and their interrelationship, and to address the broader set of extremely difficult and complex issues raised thereby, not just the narrow, technical issue of "payment" and the application of the statutory discharge. To the extent that the equitable doctrine of res judicata and collateral estoppel may be applicable in interpreting the effect of Section 22, the full record must be examined to determine whether their application is appropriate.

The sole objective of the government in seeking review is to incrementally reduce the technical force of the

Western Shoshones' position before Congress. The moral and political force of their position will remain in any event. However, review here will simply create a disincentive for the government and the Western Shoshones to resolve these problems by legislative agreement while both sides await the outcome. Further delay will adversely affect the social, political, cultural and economic well-being of both Western Shoshones and non-Indians because of continuing uncertainties of title, and continuing and seemingly interminable litigation.

Congress, Petitioner and the Western Shoshone National Council all agree that the Western Shoshone problem must ultimately be resolved by legislation regardless of the outcome here. The Petition should be denied.

Respectfully submitted,

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RICHARD W. HUGHES
(Counsel of Record)
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201 Broadway S.E.
Albuquerque, New Mexico 87102
Counsel for Amicus Curiae

APPENDIX A

UNITED STATES DEPARTMENT
OF THE INTERIOR
Bureau of Indian Affairs
Washington, D.C. 20245
November 25, 1983

Mr. Thomas E. Luebben
Attorney at Law
Luebben, Hughes and Tomita
201 Broadway, SE
Albuquerque, New Mexico 87102

Dear Mr. Luebben:

The White House has asked us to respond to your letter of September 8, 1983, regarding Western Shoshone land claims in Nevada and California. The history of the Western Shoshone land claim from the 1863 Treaty of Ruby Valley through the present certainly is complicated as a legal matter, but more importantly, it has been a matter of great personal concern to Western Shoshone Indians who have watched the legal history unfold. At the heart of the matter is whether land claims of the Western Shoshone are still valid and the manner in which the substantial judgment fund that has been awarded by the Court of Claims for the presumed extinguishment of the Shoshone's title to that land should be distributed. It is fair to say that from our perspective there are many and conflicting points of view, not only as you allege between the various agencies of the Federal Government and the Western Shoshone, but also among the Western Shoshone themselves.

As officials in the agency with principal responsibility for the administration of Indian affairs, we wish very

much to resolve these questions in a manner that best serves the interests of the Western Shoshone people. Your letter indicates that the Western Shoshone Lands Federation which you represent consists of the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe, the Battle Mountain Indian Community, and the Ely Shoshone Colony. You also indicate that other Western Shoshone interests are involved, for example, the Great Basin Western Shoshone Descendants. Negotiations of an issue which is as complicated and controversial as this requires that appropriate representatives be identified who fairly reflect the interests of the Western Shoshone. Accordingly, Mr. James Stevens, the Area Director of the Phoenix Office of the Bureau of Indian Affairs, will represent the Department and assist you in establishing a group of Western Shoshone representatives to conduct negotiations. Your efforts toward that end have been invaluable to date; your continued assistance would be appreciated. Once the matter of representation is resolved we can work with other Federal agencies both in and outside the Department of the Interior to resolve the substantive questions presented by the Western Shoshone land claim.

By a copy of this letter, we are asking Mr. Stevens to contact you directly to begin work on what we know is an issue of utmost importance to the Western Shoshone people.

Sincerely,

John W. Fritz
Deputy Assistant Secretary
Indian Affairs (Operations)

APPENDIX B

UNITED STATES DEPARTMENT
OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240
December 9, 1983

Honorable Mark Andrews
Chairman, Select Committee on
Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Indian Judgment Funds Act of October 19, 1973, 87 Stat. 466, was amended by the Act of January 12, 1983, P. L. 97-458. The provisions of the amendment have enabled us to place a number of long-awaited Secretarial plans before the Congress for its consideration. Before the New Year we expect to place additional plans and proposed legislation before the Congress.

However, a number of awards will still remain to be handled. It is the purpose of this letter to apprise the Congress of this fact and to outline the dimensions of the problem. Secretarial plans or proposed legislation have been delayed for these awards for a variety of reasons. In each instance complexities of a serious nature exist. Several involve multiple beneficiaries where questions have arisen concerning their relative interests. In others there are differences among beneficiaries as to how the award should be used. It is also true that in some instances there is a strong feeling by at least a segment of the beneficiaries that a return of land should play a part in the settlement. Further, we are concerned that in sev-

eral of these awards a minority reaction on these issues has severely limited the ability of tribal councils to develop sound program proposals.

As members of Congress are aware, in some of these awards the emotional reaction is so intense that even an attempt to hold Hearings of Record for the sole purpose of developing a plan for holding the funds in investment would be counter-productive. Such an investment approach would, of course, demand further legislation for the actual utilization of the funds and in some instances for their division.

Following is a list of those awards for which legislation will be required but where the attempt at this time to introduce proposed legislation appears to be premature and not in the best interests of either the tribes or the government.

1. *Black Hills Sioux Court of Claims 148-78 (74-B) $106 million awarded.*

> So far the Bureau of Indian Affairs has not issued its result of research paper on this award. This is the largest and one of the most complex judgment awards ever made and currently an additional legal review of preliminary results of research recommendations is underway. Also, there has developed a strong sentiment among an apparent majority of the plaintiff tribes to go slow in developing a plan for using the funds in order to fully explore all alternatives. Inherent in the process is, of course, the hope that ultimately legislation will be presented which reflects concurrence of as many as possible of the concerned parties.

2. *Western Shoshone Indian Claims Commission Docket 326-K $26 million awarded.*

> In this instance the *Dann* case [*United States v. Dann*, 706 F.2d 919 (9th Cir. 1983)] has been one of the complicating factors since it has provided an argument that land should be a factor in a final settlement since title has not been properly extinguished. Presently, groups of Western Shoshone have been discussing proposed legislation to secure both the monetary settlement and a portion of the lands in Nevada. A particularly difficult problem exists with respect to any land restoration approach due to the virtual absence of a successor tribe or tribes representative of all the recommended beneficiaries. Consequently, meaningful planning has not yet occurred.

3. *Seminole Indian Claims Commission Docket 73 & 151 $16 million awarded.*

> After protracted litigation and some effort expended to reach a compromise, the principal entities involved, the Seminole Nation of Oklahoma and the Seminole Tribe of Florida, remain apart on the division of the funds. The Oklahoma Seminole, however, accept the Secretary's findings and recommendations. Two other Florida groups, the Miccosukee Tribe and the "Unaffiliated Seminole" reject the award, but the position of the Miccosukee is somewhat unclear as to their actual desires. The Oklahoma Seminole tribal government has not been functioning for some time, further complicating the situation.

4. *Hopi Indian Claims Commission Docket 196 $5 million awarded.*

> The atmosphere closely resembles that surrounding the Black Hills case but with peculiar aspects deriving from the distinctions between ancient, traditional village structures and the legally constituted tribal council. Here meaningful planning has not been possible because of pressures of the traditional elements attitude that the award simply should not be accepted.

5. *Northern Paiute Court of Claims 342-70 $221,000 awarded.*

Action in this case has been delayed because we are awaiting a court decision concerning descendants who filed late and are protesting alleged improper notification with respect to an earlier Northern Paiute award. This award may be needed to apply to any judgment obtained in the pending court case.

6. *Lake Superior & Mississippi Chippewa ICC Dockets 18-S & 18-U $11 million awarded.*

Fourteen Chippewa groups are involved. Three groups have not responded with programing proposals. On November 18, 1983, proposed legislation was introduced as S. 2177 and H.R. 4564 for six of the Minnesota Bands at the request of the Minnesota Chippewa Tribe. The remaining bands could also be included by amending this legislation.

7. *Ottawa Chippewa, Bay Mills, Sault Ste. Marie and Grand Traverse ICC Docket 18-E, 38, 364, and 18-R $10,-149,000 awarded.*

In this instance there has been a delay in processing a proposal due to a number of factors including disagreement among the benficiaries on blood quantum requirements and records used to establish such eligibility, and a delay in adopting a constitution for Grand Traverse.

We shall continue to work with the elected leaders of the recommended beneficiary tribes to develop proposed legislation for submittal to the Congress. Such legislation will then be forwarded to Congress as soon as practical.

Sincerely,

Ken Smith
Assistant Secretary-
Indian Affairs

REPLY
BRIEF

No. 83-1476

FILED
MAY 22 1984
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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

MARY DANN AND CARRIE DANN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents assert (Br. in Opp. 3-7) that the United States has not made "payment" of the tribal claim of the Western Shoshones within the meaning of the preclusion provision in Section 22 of the Indian Claims Commission Act — even though money automatically appropriated for that purpose was placed in a special Treasury account for the Western Shoshones' benefit in satisfaction of the Indian Claims Commissions' final judgment in their favor — simply because a plan has not yet been developed for distribution of that award among the Western Shoshones themselves. See also Amicus Br. 13-16. That assertion is flatly inconsistent with the text and purposes of Section 22 and with this Court's understanding of the payment process in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977), and it wholly ignores the significance for the parties to litigation of the payment of a final judgment.

The Indians' suit seeking compensation for the extinguishment of their aboriginal title, maintained by them for more than a quarter-century against the United States pursuant to the Indian Claims Commission Act, was an action seeking a common award on behalf of a common tribal entity. That judicial proceeding finally terminated — and the award was paid — on December 6, 1979, when the Clerk of the Court of Claims certified the Commission's final award to the General Accounting Office for payment. On that date, by operation of law, funds in payment of the award were automatically appropriated and were deposited in an interest-bearing trust account on behalf of the tribal beneficiary. See Pet. 10, 21.

The plain language of Section 22(a) requires the conclusion that this appropriation of funds constituted the "payment" of the Western Shoshones' claim, which in turn had the effect under Section 22(a) of precluding any further claims and demands upon the United States touching any of the matters involved in the Western Shoshones' suit — including a claim by respondents to a right of possession based on the Shoshones' aboriginal title. The first paragraph of Section 22(a) provides that a report of the Commission to Congress determining that a "claimant" — *i.e.*, a tribal entity — is entitled to recover is deemed a "final judgment" of the Court of Claims, and that paragraph further "authorize[s] to be appropriated such sums as are necessary to pay the final determination of the Commission." The second paragraph of Section 22(a), relevant here, in turn provides that the "payment of any claim" after its determination by the Commission shall be a full discharge of the United States of all claims or demands relating to the controversy. When read in conjunction with the first paragraph of Section 22(a), it is clear that the "payment" of the "claim" occurs at the point of the appropriation mentioned

in the first paragraph and the resulting deposit of the sums involved in a special account for the tribal claimant's benefit.

The structure and purposes of Section 22 likewise require the conclusion that "payment" occurs upon appropriation of the funds for the Indians' benefit. Such an appropriation in this case fully satisfied the Indian Claims Commission's judgment against the United States and in favor of the Western Shoshones, and fully discharged the responsibility of the United States as a party to the Commission proceedings; nothing thereafter remained to be done in connection with those proceedings. The court of appeals acknowledged (Pet. App. 8a-9a), and respondents do not dispute, that Section 22 was intended to prescribe the conditions for giving res judicata effect to a judgment of the Indian Claims Commission (Pet. App. 8a-9a). Principles of res judicata are intended to further the interests in the finality of judgments, all the more so judgments resolving claims to real property. *Nevada* v. *United States*, No. 81-2245 (June 24, 1983). Against this background, the only sensible construction of Section 22 is that the res judicata effect of the Commission's judgment arises at the definite and readily ascertainable point in time when that judgment is satisfied by an appropriation of funds and all proceedings under the Indian Claims Commission Act itself are therefore terminated, not at some unspecified and indefinite future date when a distribution of the tribal award to those deemed eligible to share in it might be made pursuant to some *other* act. Respondents make no attempt to support their contrary construction of Section 22(a) by reference to the policies of res judicata that Section 22 was obviously intended to serve.

Section 22 was intended to protect the United States from further claims or demands by its opponent in Commission proceedings (the Tribe or persons, such as respondents herein, claiming through the Tribe). That protection logically should be afforded when the United States has fully discharged its obligations to its party opponent. A party in litigation ordinarily does not have a further interest in the manner in which money it has paid to its opponent in satisfaction of a judgment in turn is spent or distributed by its opponent, such that it would be appropriate to postpone the res judicata effect of the payment of the judgment until that expenditure or distribution has taken place. Although in the special area of Indian affairs the United States does have an interest in the subsequent distribution of the award, that interest arises not from its position as a party in the Indian Claims Commission proceedings (in which it was the Indians' adversary), but from its distinct fiduciary responsibility with respect to tribal property.

Indeed, respondents and amicus do not dispute our submission (Pet. 16-17) that the Indians acquired the beneficial ownership of the award on December 6, 1979, and that, thereafter, the government could act with respect to those trust funds only in its fiduciary capacity. Hence, any further action by the government respecting the judgment funds, whether it be approval of a distribution plan under the Distribution of Judgment Funds Act (25 U.S.C. 1401 *et seq.*) or "payments" from the trust account by the Department of the Interior to individual Indian beneficiaries pursuant to 25 U.S.C. 118 (see Br. in Opp. 4)[1] and an approved

[1]Nothing in 25 U.S.C. 118, upon which respondents rely (Br. in Opp. 4-6), supports their construction of Section 22(a). Section 118 assigns to the Interior Department responsibility for making payments "to" Indians "from" moneys appropriated by Congress "in satisfaction of the judgment of any court." Thus, by its terms, 25 U.S.C. 118 regards the appropriation of money to the Treasury as "satisfaction of the judgment." Section 118, which was enacted in 1911 (Act of Mar. 3, 1911, ch. 210, § 28, 36 Stat. 1077), contains no indication that disbursements to Indians from those appropriated funds were intended to be a prerequisite to giving finality to a judgment, much less to triggering the res judicata effect of the judgment under the later-enacted Section 22 of the Indian Claims Commission Act.

distribution plan, is taken by the government in its familiar role as trustee with respect to a trust corpus already established for the benefit of the Indians by the payment of the award. Those responsibilities have no relation to the government's distinct and terminated role as a litigant in the proceedings that gave rise to the award, and they therefore should have no relation to the res judicata effect of the judgment entered in those proceedings.

This Court's decision in *Delaware Tribal Business Committee* v. *Weeks, supra,* recognized this very distinction, as we point out in the Petition (at 17), and yet, remarkably, respondents do not even mention *Weeks*. There, the Court stated that "Congress *appropriated* funds to *pay* the award [to the Delawares under the Indian Claims Commission Act] and *later* enacted Pub. L. 92-456 providing for its distribution." 430 U.S. at 79 (emphasis added; footnote omitted).[2] Indeed, the appropriation act to which the Court referred in *Weeks* expressly provided funds "[f]or payment of claims" (Pub. L. No. 91-166, 83 Stat. 453) — language that is essentially identical to that in Section 22(a) giving preclusive effect to a judgment upon the "payment of any claim" — and the special distribution act involved in *Weeks* in turn referred to the funds previously appropriated as intended "to pay a judgment in favor of [the Tribes]" (25 U.S.C. 1291, quoted at 430 U.S. at 79 n.13). Thus, both the Court *and* Congress in *Weeks* viewed the payment of the Commission's award by the United States as occurring at

[2]See also 430 U.S. at 85 (emphasis added) ("the funds were *appropriated to pay an award* redressing the breach of a treaty with a tribal entity").

the time of the appropriation of the funds. And the Court further recognized that the money appropriated thereafter belonged to the tribal entity and was to be managed by the United States for its benefit in the government's fiduciary capacity. 430 U.S. at 83-86; see Pet. 17.[3]

The Distribution of Judgment Funds Act, 25 U.S.C. 1401 *et seq.*, upon which respondents also erroneously rely (Br. in Opp. 5-7), reinforces this conclusion. As the title of that Act itself suggests, it governs the use and distribution only of funds previously "appropriated *in satisfaction of a judgment* of the Indian Claims Commission" in favor of any Indian tribe or group. 25 U.S.C. 1401 (emphasis added). Congress must have intended that an appropriation of funds in "satisfaction of a judgment" of the Commission (which thereby accords finality to the Commission proceedings) also would constitute the requisite "payment" of the tribe's "claim" for purposes of giving preclusive effect to that judgment under Section 22. Although, as respondents point out (Br. in Opp. 5-7), Congress retained control over plans for distribution of judgment funds by providing for a legislative veto and requiring affirmative legislative action if the Secretary does not submit a plan within the prescribed period (25 U.S.C. 1402(a) and (b), 1405(b)), there is no indication that Congress believed that any delay in the

[3]Respondents therefore plainly err in contending (Br. in Opp. 7) that because distribution legislation has not yet defined the class of individuals embraced by the Western Shoshone Identifiable Group (the plaintiff in the Commission proceedings), it is "patently absurd" that the Commission's award can be regarded as paid and satisfied "without identifying even the class of persons receiving it." That is precisely what happened in *Weeks*. This practice reflects nothing more than the fact that an award is made to the identified tribal plaintiff in satisfaction of a *tribal* claim (430 U.S. at 85). For this reason, there is no occasion in the Indian Claims Commission Act proceedings to identify the class of persons who might subsequently share in the award to the tribe, as respondents urge.

distribution of funds already appropriated in satisfaction of a judgment would have any bearing on the finality of that judgment and its resulting res judicata effect under Section 22 of the Indian Claims Commission Act.

2. Respondents and amicus attempt (Br. in Opp. 15-17; Amicus Br. 5-7) to discredit the final judgment of the Indian Claims Commission by alleging that that judgment was improperly obtained by the claims attorney acting contrary to the wishes and instructions of the Western Shoshones. Like the underlying aboriginal title claim itself, however, this matter has already been fully litigated and resolved against them by a final judgment of the Court of Claims. In *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm'n 457 (1975), aff'd *sub nom. Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d 495 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976), the Western Shoshone Legal Defense & Education Association, with which the present respondents were associated, sought to intervene in the claims proceedings. The would-be intervenor sought to amend the claim to delete the request for an award covering certain areas, including the lands at issue in this case, or in the alternative, to seek a stay of the claims proceeding. As a basis for such intervention, the Association alleged, among other things, "that the counsel for the Indian [claimants] deliberately misled the Indians as to the nature and scope of the Commission proceedings." *Western Shoshone Legal Defense & Education Ass'n*, 531 F.2d at 500 (footnote omitted).[4] The Court of Claims,

[4]In this Court, respondents rely for their claim of collusion only on the following passing comment by the claims attorney at the hearing on intervention regarding what he had told Western Shoshone Indians: "This lawsuit is one for compensation. It doesn't change your title one bit." Br. in Opp. 15, quoting DX 8, at 21. Read in context, however, it is clear that the attorney was explaining that as to certain lands (the

however, noted that the Association and its members had for many years failed to act despite their avowed opposition to the maintenance of the claims action (*id.* at 498-499), and concluded that the Association's allegations of misrepresentation, fraud, and collusion were unsupported (*id.* at 498-503). This Court denied certiorari (429 U.S. 885). Hence, respondents are now foreclosed from questioning the validity of the Court of Claims' judgment on this ground as well.

3. Respondents seem to contend (Br. in Opp. 10-11) that review by this Court is not warranted because a legislative solution to the Shoshones' claim will be required in any event. This contention is without merit. To be sure, Congress must enact a special statute for the *distribution* of the award already paid to the Western Shoshones — just as it did for the Delawares in *Weeks* and as the Distribution of Judgment Funds Act itself contemplates may be necessary. But, if the judgment of the Indian Claims Commission is given the finality which Congress intended (but which has now been undone by the Ninth Circuit's strained construction), Congress would have no occasion in that distribution legislation to address the merits of the Western Shoshone's aboriginal title claim. To the contrary, the distribution legislation would be premised on the Commission's final judgment that that title had been extinguished. Congress enacted the Indian Claims Commission Act specifically for the purpose of relieving it from approaching the problem of such claims on the individualized basis respondents' submission would require. See Pet. 18.

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reservation and individual allotments), the claims litigation would not disturb the title the Indians concededly had, and that as to other lands, the claims litigation would not affect the Indians' title because that title had *already* been extinguished by prior actions of the government. There was nothing misleading about that description.

Of course Congress could decide when it enacted legislation for the distribution of the award, or at any other time, that an additional reservation also should be set aside for the Western Shoshones. But the fact that Congress would always retain the inherent authority to establish a reservation in the future as a matter of legislative grace provides no excuse for the Ninth Circuit to alter the existing legal rights and relationships established by the payment of the Indian Claims Commission's judgment. Moreover, the possibilities for an immediate and mutually satisfactory legislative solution are hampered by the fact that even now there is no single entity which may claim to speak with authority on behalf of all the Western Shoshones. See Amicus Br. 2 n.1. Thus, for the indefinite interim, the decision of the Ninth Circuit in this case casts a cloud of uncertainty over land titles in much of the State of Nevada and over the effective administration of the more than 15 million acres of federal lands within the claims area.[5] Section 22 was intended to prevent such uncertainty, and the decision below thus seriously disrupts the congressional scheme.[6] Review by this Court therefore is warranted.

---

[5]Respondents portray (Br. in Opp. 3) this suit as an attempt to strip them "of their herds and lands." Respondents have not shown, however, that they would be unable to obtain a federal grazing permit, provided that they apply for one and abide by the rules respecting range management. It is our understanding that respondents' father, now deceased, formerly held such grazing permits.

[6]Respondents suggest (Br. in Opp. 11) that certiorari should be denied because the government has not sought review of the merits of the Ninth Circuit's holding that aboriginal title to the particular tracts involved here had not been extinguished. This suggestion is without merit. We have confined our petition to the single question of the preclusive effect of Section 22 because that discrete issue most narrowly confines the controversy for this Court's attention and because a ruling in favor of the government on that issue would resolve the entire controversy with regard to whether the Western Shoshone still retain an aboriginal claim to the land covered by the Indian Claims Commission's

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1984

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final judgment, without a need for extensive litigation on the matter of extinguishment on a tract-by-tract basis. Cf. *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 18 & n.29. Indeed, in the Indian Claims Commission proceedings, the Western Shoshones and the United States stipulated to an average extinguishment date in order to avoid such a tract-by-tract inquiry. See Pet. 6.

DOJ-1984-05

AMICUS CURIAE

BRIEF

MOTION FILED
JUL 13 1984

No. 83-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

MARY DANN and CARRIE DANN,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES OF AMERICA, PETITIONER

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Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Land Title Association hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested, but has been denied.

The American Land Title Association is the national trade association of the land title industry. The Association has approximately 2,000 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land

title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The interest of the American Land Title Association in this case arises because of the interest of the Association and its members in the certainty and predictability of the laws affecting titles to and rights in real estate. The position advanced by the Respondents in this case calls into question the validity of the title of current landholders to approximately 22 million acres of land in Nevada, roughly one-fourth of which is held either by private landholders or the State of Nevada, with the balance held by the federal government. Respondents maintain that the United States never extinguished Western Shoshone aboriginal title to an unspecified portion of the 22 million acre tract. If Respondents or other Western Shoshone Indians successfully assert that aboriginal title remains unextinguished in this area of Nevada, the legitimate expectations of current landholders, who acquired their land in good faith, would be threatened. The American Land Title Association seeks leave to file the attached brief as amicus curiae in order to address this potential threat to the titles of current landholders.

Respectfully submitted,

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July 13, 1984

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---

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES OF AMERICA, PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Land Title Association is the national trade association of the land title industry. The Association has approximately 2,000 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the

rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The interest of the American Land Title Association in this case arises because of the interest of the Association and its members in the certainty and predictability of the laws affecting titles to and rights in real estate. This Court has long recognized the importance of stability in real estate titles:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change . . . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Nevada v. United States, —— U.S. ——, 77 L. Ed. 2d 509, 524 n.10 (1983) (quoting *Minnesota Co. v. National Co.*, 70 U.S. (3 Wall.) 332, 334 (1865)); *see, e.g., Arizona v. California*, —— U.S. ——, 75 L. Ed. 2d 318, 334 (1983); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924). The position advanced by the Respondents calls into question the validity of the title of current landholders to approximately 22 million acres of land in Nevada that was the subject of a prior proceeding brought before the Indian Claims Commission by the Western Shoshones in which the Indian Claims Commission determined that Western Shoshone aboriginal title to the land in question was extinguished.

The Respondents herein are Western Shoshone Indians who assert a claim to the land in question not in their own right but on behalf of the Western Shoshones, which Respondents claim hold unextinguished aboriginal title

to an unspecified portion of the 22 million acres at issue. Because Respondents are asserting a right of the Western Shoshones, they are bound by prior judicial determinations concerning the Western Shoshones. In 1951 representatives of the Western Shoshones filed a petition in the Indian Claims Commission asserting, in addition to other claims, a right to recover compensation for the extinguishment of Western Shoshone aboriginal title to land in Nevada, *Western Shoshone Legal Defense and Education Association v. United States*, 531 F.2d 495, 497 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976), and in 1957 the Commission held a trial on the issue of Western Shoshone title to this land. In 1962 the Commission determined that the Western Shoshones once held aboriginal title to 22,211,753 acres of land in Nevada, and that the United States had extinguished that aboriginal title by the gradual encroachment of settlers and others and by the acquisition, disposition, or taking of the lands by the United States for its own use and benefit and that of its citizens. *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387, 416 (1962).

After a trial in 1967 on the value of the Western Shoshone aboriginal title to land in Nevada, the Indian Claims Commission valued Western Shoshone aboriginal land in Nevada at $21,350,000, and awarded an additional $4,604,000 as compensation for minerals removed from the land prior to the valuation date. *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5 (1972). The Commission then considered evidence on the amount of compensation previously received by the Western Shoshones for the land, and ultimately entered a final judgment awarding $26,145,189 to the Western Shoshones. *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318 (1977). This final judgment was affirmed by the Court of Claims, 593 F.2d 994 (Ct. Cl. 1979), and a petition for a writ of

certiorari was denied by this Court. 444 U.S. 973 (1979). *See generally Western Shoshone Identifiable Group v. United States*, 652 F.2d 41, 42-45 (Ct. Cl. 1981).

The Respondents now maintain that the United States never extinguished Western Shoshone aboriginal title to some unspecified portion of the 22 million acre tract, and therefore that the Western Shoshones have a present right to possess the land. Roughly one-fourth of the 22 million acre tract is held either by private landholders or the State of Nevada, with the balance of the tract held by the federal government. If Respondents or other Western Shoshones assert successfully that aboriginal title remains unextinguished in this area of Nevada, the legitimate expectations of current landholders, who acquired their land in good faith, would be threatened.[1]

[1] It is unclear whether the Western Shoshones claim that aboriginal title remains unextinguished with respect to privately held land. In an earlier filing in this Court, Western Shoshones indicated that they claimed only land held by the United States. *See* Petition for a Writ of Certiorari to the United States Court of Claims at 5-6, *Western Shoshone Identifiable Group v. United States*, No. 79-340 (October Term, 1979), *cert. denied*, 444 U.S. 973 (1979). The Court of Appeals below described the Temoak Band of the Western Shoshones as claiming 12 million acres of the 22 million acre tract. 706 F.2d at 922. In the Brief on Behalf of Amicus Curiae Western Shoshone National Council In Opposition to Petition for a Writ of Certiorari filed in this proceeding, however, the Western Shoshone National Council suggested the possibility of claims against private landholders. *See id.* at 12 ("The Western Shoshones will be free to initiate quiet title and ejectment actions against certain private parties. The Western Shoshones may have a large claim for mineral royalties against the various companies who have operated on unextinguished Western Shoshone title lands."). In any event, if Western Shoshone aboriginal title remains unextinguished with respect to land held by the United States, it may be argued by the Western Shoshones that it remains unextinguished with respect to privately held land as well.

SUMMARY OF ARGUMENT

The Indian Claims Commission and the Court of Claims determined that Western Shoshone aboriginal title to the 22 million acre tract of land in Nevada has been extinguished. That determination is conclusive and binds those, such as the Respondents, claiming under Western Shoshone aboriginal title.

In addition, the $26 million judgment awarded to the Western Shoshones by the Indian Claims Commission has been paid by the United States within the meaning of section 22(a) of the Indian Claims Commission Act, 25 U.S.C. § 70u (1976), which provides: "The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." Section 22(a) also bars the claim asserted by Respondents in this case.

ARGUMENT

I. The Indian Claims Commission and the Court of Claims Have Determined That Western Shoshone Aboriginal Title to Land in Nevada Has Been Extinguished, and That Determination Is Conclusive and Binds the Respondents.

The Indian Claims Commission and the Court of Claims determined that Western Shoshone aboriginal title to land in Nevada was extinguished. Whether analyzed in terms of the doctrines of election of remedies, judicial estoppel, collateral estoppel or res judicata, the result is the same: The determination of the Indian Claims Commission and Court of Claims is conclusive and binds Western Shoshone Indians such as Respondents.

A. The Indian Claims Commission and the Court of Claims determined that Western Shoshone aboriginal title to land in Nevada has been extinguished.

The Indian Claims Commission has held repeatedly that Western Shoshone aboriginal title to land in Nevada was extinguished. In *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387, 416 (1962) (Finding of Fact Number 26), the Commission stated:

> The Commission further finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Findings 22 and 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States. The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.

The Commission reiterated its conclusion in its opinion in *Wind River*, stating:

> The Commission also concludes that the Lemhi Tribe, the Goshute Tribe or identifiable group, and the Western Shoshone identifiable group were land-using entities which respectively held Indian title to the lands described in Findings of Fact Nos. 21, 22 and 23, and that said Indian title was acquired by

> the United States from these three aforementioned land-using entities without the payment of compensation therefor and said land-using entities are entitled to recover under Section 2, Clause (4) of the Indian Claims Commission Act.

11 Ind. Cl. Comm. at 445.

In subsequent opinions considering the Western Shoshone claim, the Indian Claims Commission repeatedly made it clear that Western Shoshone aboriginal title had been extinguished. In its decision determining the value of the aboriginal title extinguished by the United States, the Commission stated:

> In its decision in the title phase of this case, *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, Dockets 326 and 367, 11 Ind. Cl. Comm. 387 (1962), the Commission concluded that the Western Shoshone identifiable group was a land using group or entity which held Indian title to lands in Nevada and California described in Finding 23 therein, that Indian title was acquired by the United States from the Western Shoshones without payment of compensation therefor, and that the Western Shoshones were entitled to recover under Clause 4, Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050). The Commission concluded further that Indian title to the Western Shoshone land in California was extinguished by the United States on March 3, 1853, and that Indian title to the remainder of the Western Shoshone lands was extinguished by the gradual encroachment of settlers and others and by the acquisition, disposition, or taking of said lands by the United States for its own use and benefit or that of its citizens, as set forth in Finding 26.

Western Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5, 5-6 (1972). The Commission again reaffirmed its conclusion when an organization known as

the Western Shoshone Legal Defense and Education Association sought to stay the Indian Claims Commission proceedings in order to assert a claim that Western Shoshone aboriginal title to land in Nevada had not been extinguished. The Commission stated:

> Both parties introduced evidence on the issue of plaintiff's aboriginal title and the issue was tried in an adversary proceeding. Far from being the result of agreement or collusion between the plaintiff's counsel and the defendant, the Commission's Finding 23 relating to the area of plaintiff's use and occupancy at the time of the Treaty of Ruby Valley, and Finding 26 relating to the extinguishment of aboriginal Indian title, were based on issues resolved after hearing before the Commission, and on the consideration of oral and documentary evidence. In fact, in the title phase of this case, the area of aboriginal use and occupancy by the plaintiff and the extinguishment of the plaintiff's aboriginal title were fundamental prerequisites in establishing the plaintiff's claim.

Western Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457, 465 (1975), *aff'd*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976). The Commission then quoted Finding of Fact Number 26 and stated: "This finding is an adjudication that title was extinguished, as stated expressly in paragraph 6 of the Commission's interlocutory order of October 16, 1962 . . . ." *Id.* at 466. These excerpts from the decisions of the Indian Claims Commission make it clear beyond peradventure that the Commission concluded that Western Shoshone aboriginal title to land in Nevada has been extinguished.

The Court of Claims confirmed that Western Shoshone aboriginal title has been extinguished. The court stated:

> After a trial contested on these grounds, the Commission held that the Western Shoshones held aboriginal title to the territory involved here and that

> this title was extinguished by a process of gradual encroachment by whites and settlers. Appellants insist that the subject of title-extinction was never tried, going simply by the concurrent agreement of the parties. But evidence on that issue was contained in the materials presented at the 1957 trial and the Indian appellees asked generally for findings that the Shoshone lands had been taken; the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title extinction never arose. The Commission made its own determination that the Shoshone Indian title to the area in question was extinguished by encroachment.

Western Shoshone Legal Defense and Education Association v. United States, 531 F.2d 495, 500 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976); *accord Western Shoshone Identifiable Group v. United States*, 652 F.2d 41, 46 (Ct. Cl. 1981).

B. The doctrines of election of remedies and judicial estoppel bar the Respondents from claiming that Western Shoshone aboriginal title to land in Nevada remains unextinguished after the Western Shoshones have won a judgment before the Indian Claims Commission and the Court of Claims based upon a fundamentally inconsistent theory.

The doctrine of election of remedies bars the Respondents from asserting as representatives of the Western Shoshones that Western Shoshone aboriginal title to land in Nevada remains unextinguished, because that assertion is fundamentally inconsistent with the theory of the Western Shoshone claim before the Indian Claims Commission, upon which the Western Shoshones have won a judgment. The doctrine of election of remedies prevents a party who has won a judgment based on a certain state of facts from proceeding in a second action on the basis

of an alleged state of facts inconsistent with and repugnant to the state of facts relied on in the first action.[2] This doctrine has long been recognized and applied by this Court and other federal courts.[3]

The doctrine of election of remedies is applicable when, as here, a party wins a judgment based on the theory that title to property has passed to another and subsequently seeks to proceed on the theory that title remains in the party.[4]

In addition to the doctrine of election of remedies, courts have also relied on a closely related doctrine, that of judicial estoppel, to bar a party from asserting a position in subsequent litigation contrary to a position that the party successfully asserted in earlier litigation. In one of the leading cases applying this doctrine, *Scarano v. Central Railroad Co.*, 203 F.2d 510 (3d Cir. 1953), the plaintiff sued his employer alleging that an injury

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[2] *See Georgia Power Co. v. Fountain*, 207 Ga. 361, 61 S.E.2d 454, 457 (1950), *cert. denied*, 340 U.S. 934 (1951).

[3] *See, e.g., United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922); *Crues v. KFC Corp.*, 729 F.2d 1145, 1153 (8th Cir. 1984); *United States v. Thomas*, 709 F.2d 968, 971 (5th Cir. 1983); *Burrus v. American Casualty Co.*, 518 F.2d 1267, 1270 (7th Cir. 1975); *Twin City Federal Savings and Loan Association v. Transamerica Insurance Co.*, 491 F.2d 1122, 1124-25 (8th Cir. 1974); *Baldridge v. Hadley*, 491 F.2d 859, 865-66 (10th Cir.), *cert. denied*, 417 U.S. 910 (1974); *Henderson Tire & Rubber Co. v. Gregory*, 16 F.2d 589, 593 (8th Cir. 1926) (and cases cited therein).

[4] *Slater v. Shell Oil Co.*, 58 Cal. App. 2d 864, 137 P.2d 713 (1943); *Georgia Power Co. v. Fountain*, 207 Ga. 361, 61 S.E.2d 454, 457-58 (1950), *cert. denied*, 340 U.S. 934 (1951); *see United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922); *Taylor v. Robertson Petroleum Co.*, 156 Kan. 822, 137 P.2d 150 (1943); *Shoreham Developers, Inc. v. Randolph Hills, Inc.*, 305 A.2d 465 (Md. 1973); *Berger v. Mercantile Trust Co.*, 352 S.W.2d 644 (Mo. 1961); *Ladd v. General Insurance Co.*, 236 Or. 260, 387 P.2d 572 (1963); *cf. Albert v. Kopplin Molding Corp.*, 247 F.2d 107, 110 (8th Cir. 1957) ("Rescission and damages for breach of contract are inconsistent remedies and an election to pursue one remedy, prosecuted to final judgment, bars the other remedy.").

on the job had totally incapacitated him and prevented him from resuming his former occupation or any other employment. A judgment in favor of plaintiff was entered by the court and paid by defendant. Less than 30 days after the plaintiff's first suit was resolved, he sought reinstatement to his former job, relying on the terms of a collective bargaining agreement providing that any employee injured in the course of his employment was entitled to reinstatement as soon as he was physically able to perform the duties of his job. When the defendant refused to reinstate the plaintiff, the plaintiff sued for breach of the collective bargaining agreement seeking damages for wages lost since the defendant's refusal to reinstate him and for future wages. Defendant moved for summary judgment on the basis of the earlier suit.

The trial court granted summary judgment for the defendant and the Third Circuit agreed. After noting that collateral estoppel did not apply to the case, the Third Circuit held that the plaintiff nevertheless was estopped from asserting that he was fit to resume his former job less than one month after receiving a judgment based on his claim that he was totally incapacitated from resuming his former job or any other employment. The Third Circuit determined that "[s]uch use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." *Id.* at 513.

The parallels between the *Scarano* case and the case here are obvious. After the Western Shoshones participated in 30 years of litigation before the Indian Claims Commission and the Court of Claims in which they alleged that their aboriginal title to land in Nevada had been extinguished, and after winning a $26 million judgment as compensation for the extinguishment of their

aboriginal rights, the Respondents now maintain on behalf of the Western Shoshones that Western Shoshone aboriginal title has never been extinguished. This assertion by the Respondents on behalf of the Western Shoshones is completely inconsistent with the earlier Western Shoshone position, successfully maintained, that the United States extinguished Western Shoshone aboriginal title. This is precisely the "playing fast and loose with the courts" condemned in *Scarano*.[5]

C. The doctrine of collateral estoppel bars the Respondents from claiming that Western Shoshone aboriginal title to land in Nevada remains unextinguished after the Indian Claims Commission and the Court of Claims determined that Western Shoshone aboriginal title has been extinguished.

The doctrine of collateral estoppel applies when:

(1) the issue was identical to one in a prior adjudication;

(2) there was a final judgment on the merits;

(3) the estopped party was a party to or in privity with a party to the prior adjudication; and

(4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining Co., 722 F.2d 1407, 1413 (8th Cir. 1983); *see Kremer v. Chemical Construction Corp.*, 456

[5] Other court of appeals decisions have recognized or applied the doctrine of judicial estoppel in a variety of circumstances. *See Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1214-16 (9th Cir. 1984); *Marroquin-Manriquez v. Immigration and Naturalization Service*, 699 F.2d 129, 136 (3d Cir. 1983); *Garcia v. Andrus*, 692 F.2d 89, 94 (9th Cir. 1982); *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595, 598-600 (6th Cir. 1982); *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166-68 (4th Cir. 1982); *City of Kingsport v. Steel and Roof Structure, Inc.*, 500 F.2d 617, 620 (6th Cir. 1974); *Jett v. Zink*, 474 F.2d 149, 155 (5th Cir. 1973); *Smith v. Montgomery Ward & Co., Inc.*, 388 F.2d 291, 292 (6th Cir. 1968).

U.S. 461, 466 n.6 (1982); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 332 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 323-24 (1971); *Oldham v. Pritchett*, 599 F.2d 274, 279 (8th Cir. 1979) (quoting *Gerrard v. Larsen*, 517 F.2d 1127, 1130 (8th Cir. 1975)).

Application of the elements of the doctrine of collateral estoppel to this case demonstrates that the Respondents, whose claim is grounded on the alleged aboriginal title of the Western Shoshones, are precluded from maintaining that the Western Shoshones possess unextinguished aboriginal title to land in Nevada. The Indian Claims Commission and Court of Claims determined that Western Shoshone aboriginal title to land in Nevada was extinguished. *See* pages 6-9, *supra*.[6] Thus the issue here is identical to the issue before the Indian Claims Commission and Court of Claims, and the first element of the collateral estoppel test is satisfied.

The proceedings before the Indian Claims Commission and Court of Claims resulted in a final judgment on the merits, *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318 (1977), *aff'd*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979), thereby satisfying the second element of the collateral estoppel test.

The third element of the collateral estoppel test is satisfied because the Respondents are in privity with the

[6] The Court of Appeals below ruled that the issue of the extinguishment of Western Shoshone aboriginal title to land in Nevada "was neither actually litigated nor actually decided in the proceedings before the [Indian Claims Commission]." 706 F.2d at 922-24 (quoting *United States v. Dann*, 572 F.2d 222, 226 (9th Cir. 1978) (per curiam)). The excerpts from the decisions of the Indian Claims Commission and the Court of Claims discussed at pages 6-9, *supra*, show that the Court of Appeals was simply wrong.

Western Shoshones with respect to the issue of the extinguishment of Western Shoshone aboriginal title to land in Nevada.[7] Aboriginal title is a right that can only be held by an Indian tribe; no individual Indian can claim aboriginal title in his own right. "It is settled that '[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'" *United States v. Jim*, 409 U.S. 80, 82 (1972) (quoting *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1903)). Thus with respect to aboriginal title rights, individual members of a tribe are bound by litigation conducted by the tribal representative. *Cf. Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983) (Oglala Sioux Tribe, as one of the tribes comprising the Sioux Nation, is in privity with Sioux Nation for purposes of collateral estoppel arising from Indian Claims Commission judgment).

The final element of the collateral estoppel test requires that the estopped party or its privy (in this case, the Western Shoshones) be given a full and fair opportunity to be heard on the adjudicated issue. The Western Shoshones had such an opportunity, and took full advantage of it. As the excerpt from the decision of the Court of Claims in *Western Shoshone Legal Defense and Education Association* quoted on pages 8-9, *supra*, makes clear, the Indian Claims Commission heard evidence on the question of the extinguishment of Western Shoshone aboriginal title to land in Nevada, and "made its own determination that the Shoshone lands were held by separate Shoshone entities and that Indian title to the area in question was extinguished by encroachment." *Western Shoshone Legal Defense and Education Association*

[7] The Court of Appeals below found it unnecessary to consider this issue. 706 F.2d at 924 n.3.

v. United States, 531 F.2d 495, 500 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976).[8]

II. The Judgment of the Indian Claims Commission and the Court of Claims Awarding $26,145,189 to the Western Shoshones Was Paid Within the Meaning of Section 22(a) of the Indian Claims Commission Act When the Award Was Appropriated and Held in Trust for the Western Shoshones, and the Payment of the Award Bars the Claim Made by the Respondents.

Section 22(a) of the Indian Claims Commission Act, 25 U.S.C. § 70u (1976), provides: "The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." The Court of Appeals below held that this provision did not bar the Respondents' claim because the $26 million judgment awarded to the Western Shoshones by the Indian Claims Commission and Court of Claims had not been paid, even though the amount of the award had been appropriated by Congress and placed in trust for the benefit of the Western Shoshones. 706 F.2d at 925-27. The Court of Appeals below is in error; payment has been made within the meaning of section 22(a), and the Respondents are foreclosed from maintaining that Western Shoshone aboriginal title has not been extinguished.

[8] Respondents cannot escape the effect of the ruling by the Indian Claims Commission and Court of Claims that Western Shoshone aboriginal title to land in Nevada was extinguished by asserting that the Western Shoshone failed to argue before the Indian Claims Commission that Western Shoshone aboriginal title remained unextinguished. "[C]ollateral estoppel [does not] permit a contention not made in the prior action to be urged subsequently as a means of contradicting an adjudicated finding; in such a case the new contention is subsumed in the issue already adjudicated, and is thus precluded." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.443 [3] at 773 (2d ed. 1983).

Pursuant to the statutory framework in effect at the time that final judgment on the Indian Claims Commission award in favor of the Western Shoshones was entered, the $26 million necessary to pay the award was automatically appropriated and deposited in an interest-bearing trust account for the benefit of the Western Shoshones. *See* 31 U.S.C. § 724(a) (Supp II 1978). The $26 million trust fund is now the property of the Western Shoshones, and the United States cannot take the fund without incurring an obligation to pay just compensation pursuant to the fifth amendment. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 408-09 (1980); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937). While the United States, in its capacity as trustee of Indian property, has a fiduciary duty to supervise the expenditure of the fund, that trusteeship function does not impair the Western Shoshones' property rights in the fund. Congress enacted the Distribution of Judgment Funds Act, 25 U.S.C. §§ 1401-07 (1982), to provide statutory guidance for the exercise by the United States of its fiduciary duty to supervise the expenditure of funds derived from Indian Claims Commission judgments. Furthermore the United States, as fiduciary, may be held accountable for a breach of its fiduciary duty in the management of the Western Shoshone judgment fund. *See United States v. Mitchell*, —— U.S. ——, 77 L. Ed. 2d 580, 597 (1983).

The decision of the Court of Appeals below ignores the fundamental distinction between the United States as judgment debtor and the role of the United States as trustee of Indian property. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 408 (1980); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977); *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968). When the $26 million was appropriated and paid into trust for the benefit of the Western Shoshones, the United States no longer had any right to use or control

the $26 million for its own benefit, and its role as judgment debtor ended. Thereafter, the role of the United States with respect to the $26 million was solely its role as trustee for Indian property. Payment within the meaning of section 22(a) occurred when the role of the United States as judgment debtor ended.

Nothing in the legislative history of the Indian Claims Commission Act provides support for the view of the Court of Appeals below with respect to payment under section 22(a). The purpose of the Indian Claims Commission Act was to relieve Congress of the responsibility for deciding the merits of Indian claims, which it previously had done by considering requests for special jurisdictional acts. *See* H.R. Rep. No. 1466, 79th Cong., 1st Sess. 6 (1945). During its consideration of the Indian Claims Commission Act, Congress rejected a proposal by the Department of Justice that Congress retain final authority to review Indian Claims Commission decisions. The Department of Justice argued that without such final review by Congress the Commission would be "virtually a court with the power to determine claims" and that such an arrangement "would constitute a surrender by Congress of its very necessary prerogative to sift and control this unusual type of claim against the government." S. Rep. No. 1715, 79th Cong., 2d Sess. 7 (1946). Although the Senate was persuaded by the Department of Justice, *see id.* at 6, the House of Representatives was not. *See* H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10, 13 (1945). The view of the House of Representatives prevailed in conference. *See* H.R. Rep. No. 2693, 79th Cong., 2d Sess. 8 (1946).

This case represents one more attempt by an Indian tribe to turn its back on the remedy provided by the Indian Claims Commission in the hope of obtaining a greater recovery from Congress by asserting a present right to possess huge amounts of land. Other tribes are pursuing a similar strategy. *See, e.g., Oneida Indian Nation of New York State v. County of Oneida*, 719

F.2d 525 (2d Cir. 1983), *cert. granted*, Nos. 83-1065 and 83-1240 (1984) (Indian Claims Commission proceeding involving 250,000 acres in New York; tribe voluntarily dismissed Indian Claims Commission proceeding after winning judgment on liability); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (tribe claims title to 7.3 million acres of land despite Indian Claims Commission award of $105 million covering land); *Navajo Tribe of Indians v. New Mexico*, Civ. No. 82-1148-JB (D. New Mex. Jan. 23, 1984), *appeal pending* (Indian Claims Commission award of $14.8 million; tribe now claims title to 1.9 million acres of land); *see also Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983). These attempts are directly contrary to this Court's oft-expressed rule "that questions affecting titles to land, once decided, should no longer be considered open," *Arizona v. California*, —— U.S. ——, 75 L. Ed. 2d 318, 334 (1983), and are also contrary to the congressional purpose in establishing the Indian Claims Commission. *See Six Nations Confederacy v. Andrus*, 610 F.2d 996, 998 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) ("Because Congress enacted a special and exclusive system for determination of claims under the Indian Claims Commission Act, appellant could not choose for itself another avenue of relief. Congress had selected the route that had to be followed."); *Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994, 997-99 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979) ("There can be no doubt that Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all.")[9] If tribes that have brought claims

[9] Indeed, courts have held that Congress intended the Indian Claims Commission to be the exclusive remedy for ancient Indian land claims. *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Navajo Tribe of Indians v. New Mexico*, Civ. No. 82-1148-JB (D. New Mex. Jan. 23, 1984), *appeal pending*.

before the Indian Claims Commission are now free to assert that their aboriginal title remains unextinguished despite determinations to the contrary by the Indian Claims Commission, titles to enormous tracts of land will be threatened, the congressional goal of adjudicating ancient Indian claims once and for all will be thwarted, and more than 30 years of judicial effort by the Indian Claims Commission—and by the Court of Claims and this Court in reviewing Indian Claims Commission proceedings—will be wasted. In all these cases it is for Congress to determine whether some additional recovery is warranted.

CONCLUSION

Both because the doctrines of election of remedies, judicial estoppel and collateral estoppel preclude the Respondents from asserting that Western Shoshone aboriginal title to land in Nevada remains unextinguished, and because the judgment of the Indian Claims Commission has been paid within the meaning of section 22(a) of the Indian Claims Commission Act, thereby barring the claim asserted by Respondents, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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PETITIONER'S

BRIEF

No. 83-1476

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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MARY DANN AND CARRIE DANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Indian Claims Commission entered a final judgment awarding the "Western Shoshone Identifiable Group" of Indians in excess of $26 million as damages for the extinguishment of their aboriginal title to over 24 million acres in Nevada and California. Section 22(a) of the 1946 Indian Claims Commission Act provides that upon "payment of any claim" adjudicated by the Commission, the United States receives a "full discharge" of "all claims and demands touching any of the matters involved in the controversy." Funds to pay the Western Shoshone judgment have been automatically appropriated pursuant to 31 U.S.C. (Supp. V 1981) 724a. The judgment fund has been deposited in an interest-bearing trust account in the Treasury for the benefit of the Western Shoshones. However, the proceeds have not yet been distributed to individual Indians, or committed to any other designated tribal purpose, pursuant to a plan established under the Distribution of Judgment Funds Act, 25 U.S.C. 1401 *et seq.*

The question presented is whether, under these circumstances, the Western Shoshone remain free to assert, in collateral litigation, that aboriginal title to lands covered by the Claims Commission award has never been extinguished.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 706 F.2d 919. The judgment order of the district court (Pet. App. 30a-32a) is unreported. A prior opinion of the court of appeals is reported at 572 F.2d 222.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a) was entered on May 19, 1983. An order denying a petition for rehearing (Pet. App. 34a) was entered on November 7, 1983. On January 27, 1984, Justice Rehnquist entered an order extending the time for filing a petition for a writ of certiorari through March 6, 1984. The petition was filed on that date and was granted on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 22 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, 25 U.S.C. (1976 ed.) 70u,[1] provides:

> (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this [Act] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

2. 31 U.S.C. (Supp. V 1981) 724a[2] provides in pertinent part:

[1] The Act does not appear in the 1982 version of the United States Code because, pursuant to 25 U.S.C. (1976 ed.) 70v, the existence of the Indian Claims Commission terminated on September 30, 1978. The residual docket of the Commission was transferred to the United States Court of Claims by 25 U.S.C. (Supp. V 1981) 70v-3. Neither this transfer nor the subsequent reorganization of the Court of Claims into the United States Claims Court and the United States Court of Appeals for the Federal Circuit has any bearing upon the question presented.

[2] Title 31 has now been recodified. The counterpart to former 31 U.S.C. (Supp. V 1981) 724a is codified at 31 U.S.C. 1304(a). Because the Indian Claims Commission no longer exists (see note 1, *supra*), the recodified provision omits all reference to Indian Claims Commission awards on the theory that the provision is no longer of current relevance. See H.R. Rep. 97-651, 97th Cong., 2d Sess. 62 (1982).

> There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of Section 2414, 2517, 2672, or 2677 of title 28 and * * * awards rendered by the Indian Claims Commission * * *.

STATEMENT

In this action, the court of appeals held that neither entry of a final judgment by the Indian Claims Commission awarding an Indian tribal group compensation for the extinguishment of their aboriginal title to land, nor the actual deposit of funds appropriated to pay the judgment into a trust account for the tribal group, maintained in the Treasury, bars a member of the beneficially interested tribe from asserting, in collateral litigation, that aboriginal title has not been extinguished. The court further ruled that, contrary to the premise of the Indian Claims Commission proceedings maintained by the tribal group in which the claims award was made, the United States has never extinguished tribal aboriginal title to the lands in question.

1. The United States commenced this trespass action in 1974 by filing a complaint in the United States District Court for the District of Nevada alleging that respondents Mary Dann and Carrie Dann were grazing livestock on eight sections of federal public lands in the Elko Grazing District in Nevada without a grazing permit from the Bureau of Land Management (BLM). The complaint charged that the unauthorized grazing constituted a violation of

regulations issued by the Secretary of the Interior pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* The government sought an injunction barring the Danns from grazing their animals without a BLM grazing permit and also requested damages for the past grazing trespasses.

Respondents answered the trespass charge by asserting that BLM lacked authority to administer the lands because "said lands are beneficially owned by the defendants and other members of the Western Shoshone Tribe." The answer requested that the court enter judgment declaring that "the defendants are members of the Western Shoshone Tribe of Indians" and that "the Western Shoshone tribes of Indians are the recognized beneficial owners of the land" described in the complaint.

2. The lands occupied by respondents are a small part of a much larger area that was the subject of proceedings before the Indian Claims Commission at the time that the government's complaint in this trespass action was filed. The Indian Claims Commission had been established in 1946, in order to provide a monetary damages remedy against the United States for wrongs allegedly committed by the United States in its dealings with the Indian tribes. The Commission was authorized to "hear and determine" claims on behalf of any "Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States." Section 2, 25 U.S.C. (1976 ed.) 70a. Claims within the Commission's jurisdiction included, at one extreme, some that were relatively conventional in nature, and which generally might have been maintained against the United States by any aggrieved person, such as those based upon the Constitution, federal laws, treaties or executive orders. Section 2(1), 25 U.S.C. (1976 ed.) 70a(1); compare 28

U.S.C. 1491. At the other extreme, the Commission's jurisdiction embraced some categories of claims as to which the United States had not consented to suit by non-Indian claimants: "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Section 2(5), 25 U.S.C. (1976 ed.) 70a(5).

In the Claims Commission proceedings, originally filed in 1951, various Shoshone tribal groups sought, through representative parties, to recover damages for the loss of aboriginal title to lands located in Nevada, California, Idaho, Wyoming and Colorado that they claimed to have possessed.[3] The Commis-

[3] In 1863 the United States negotiated five separate treaties with the various bands of Shoshone Indians. Four of these, including the Treaty of Ruby Valley, 18 Stat. 689 (1869), with the Western Shoshones, and the Treaty of Box Elder, 13 Stat. 663 (1863), with the Northwestern Shoshones, ultimately were enacted into law. See *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 340-345 (1945). Years later, the Northwestern Band of Shoshone Indians brought an action, pursuant to a special jurisdictional act, asserting that they had wrongfully been divested of lands that they claimed had been confirmed to them by the Treaty of Box Elder. In *Northwestern Bands of Shoshone Indians, supra*, this Court held that the Treaty of Box Elder did not recognize or confirm Indian title to any lands. Although only the Treaty of Box Elder was directly at issue in *Northwestern Bands of Shoshone Indians*, the Court's opinion discusses all of the treaties entered with the Shoshones in 1863, which were "similar in form" (324 U.S. at 343). And the Court's conclusion that no recognized title had been conferred is stated in terms applicable, as well, to the Treaty of Ruby Valley (324 U.S. at 348):

> Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely

sion decided to consider the claims of the constituent bands or identifiable groups of the larger Shoshone Nation separately. The Commission found that the Western Shoshone constituted a separate identifiable group for the purpose of presenting a claim against the United States. It also found that the Temoak Band of Shoshone Indians, a federally recognized band of Western Shoshones organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, was a proper representative of the Western Shoshone Identifiable Group. See 25 U.S.C. (1976 ed.) 70i. Thus, the Temoak Band was authorized to maintain, on behalf of the entire Western Shoshone group, a claim for damages for the extinguishment of aboriginal title to 22 million acres in Nevada and 2 million adjoining acres located in California that had allegedly been occupied by the Western Shoshones.[4] The basis for that claim, as set out

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expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

Unlike taking of land in which a tribe holds recognized title, which implicates the constitutional guaranty of just compensation, see, *e.g.*, *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938), the United States may extinguish aboriginal Indian title without incurring any obligation under the Constitution to pay compensation. See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279-285 (1955). Accordingly, the Shoshones' claim for compensation was wholly dependent upon the broad provisions of the Indian Claims Commission Act (see page 5, *supra*), enacted after *Northwestern Bands of Shoshone Indians* was decided.

[4] See *Shoshone Tribe* v. *United States*, 11 Indian Cl. Comm'n 387, 388, 408-412, 421-435, 446 (1962); *Western Shoshone Identifiable Group* v. *United States*, 29 Indian Cl. Comm'n 5, 6, 63 (1972); *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d 495, 499 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

in the claimant's Proposed Findings of Fact and Brief filed in the claims proceeding (at 2-3), was that the Western Shoshones' aboriginal lands had been "taken from them from time to time by" the United States and that the United States "ha[d] obtained their lands and extinguished their original Indian title without compensation and under circumstances which did not comport with fair and honorable dealings * * *."

Following a trial and briefing of the land title issues, the Indian Claims Commission entered an interlocutory order on October 16, 1962, in which it found that the Western Shoshone had held aboriginal title to 24,396,403 acres of land in the present States of California and Nevada. *Shoshone Tribe* v. *United States*, 11 Indian Cl. Comm'n 387, 413-414 (1962). The Commission found that title to the Shoshone lands in California had been extinguished on March 3, 1853 (*id.* at 415). With respect to the bulk of the lands, located in Nevada, the Commission found that aboriginal title had been extinguished over a period of years through "gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of the [Western Shoshones'] lands by the United States for its own use and benefit, or the use and benefit of its citizens" (*id.* at 416). Because it could not then identify a precise date for these actions, as to particular parcels of land, the Commission reserved the question of the date of extinguishment of aboriginal title to the Nevada lands for further proceedings (*ibid.*).

In order to avoid complex litigation as to the extinguishment date for particular parcels within their aboriginal domain in Nevada, the Western Shoshones and the United States stipulated to an average extinguishment date of July 1, 1872, to serve as the valuation date for determining compensation due. The

stipulation was approved by the Commission. See *Western Shoshone Identifiable Group* v. *United States*, 29 Indian Cl. Comm'n 5, 7 (1972). Following a trial in 1967, the Commission determined the fair market value of the Nevada lands acquired from the Western Shoshones in 1872 to have been $21,350,000 (*id.* at 124).

3. The claims proceedings went forward as the Commission considered unsettled monetary issues that had to be resolved prior to entry of a final award. Before that could occur, however, in April 1974—23 years after the Western Shoshone claim was presented to the Commission, and 12 years after the Commission had found that the United States had extinguished the Shoshones' aboriginal title—a group identified as the Western Shoshone Legal Defense and Education Association, with which the present respondents were associated,[5] attempted to intervene in the claims proceeding to amend the pending claim. The would-be intervenor sought to limit the claim to reflect its position that Western Shoshone aboriginal title to a portion of the lands covered by the claim, including the sections now claimed by the respondents, remained unextinguished. The intervenor also sought a stay of the claims proceedings pending a decision in the instant case, which had then been filed in the district court.

The Commission denied the motion to intervene, concluding, inter alia, that the question of extinguishment of aboriginal title had been presented to it and had been decided by it in its earlier ruling. *Western Shoshone Identifiable Group* v. *United*

[5] See Amicus Br. of the Western Shoshone Legal Defense and Education Ass'n, Mary Dann and Carrie Dann at 2, *Western Shoshone Identifiable Group* v. *United States*, No. 79-340 (1979 Term); see also Pet. App. 3a; Br. in Opp. 15 n.3.

States, 35 Indian Cl. Comm'n 457, 464-467 (1975). The Commission also rejected the Association's charge that the Temoak Band was disabled from serving as the exclusive representative of the Western Shoshones in the claims proceeding because it had engaged in "collusion" within the meaning of Section 10 of the Indian Claims Commission Act, 25 U.S.C. (1976 ed.) 70i (35 Indian Cl. Comm'n at 463-476). The Court of Claims affirmed these rulings in *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d 495 (1976), specifically rejecting the Association's allegation of collusion in the Western Shoshones' conduct of the claims proceeding as both tardy and unsupported by the record (*id.* at 498-503).[6] The Court of Claims also held that the extinguishment issue had been decided, on the basis of relevant evidence, by the Commission (*id.* at 500). This Court then denied certiorari. 429 U.S. 885 (1976). Throughout these proceedings the Western Shoshone Identifiable Group adhered to the position that the extinguishment issue had been decided, and correctly so, by the Commission.[7]

4. Before further action could occur in the claims proceedings, the district court, on January 5, 1977, entered summary judgment in favor of the United States in the instant trespass action. Respondents

[6] The Court of Claims observed, in an aside (531 F.2d at 503 n.16), that because Section 22(a) of the Indian Claims Commission Act does not bar collateral attack upon determinations underlying Claims Commission decisions until a claim has been paid, the majority faction of the Western Shoshones retained the option, if it was so advised, of asking Congress to delay making an appropriation to pay the claims award while seeking to litigate its title claim.

[7] See, *e.g.*, Br. in Opp. for the Western Shoshone Identifiable Group at 4-9 & n.14, *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, No. 76-90 (1976 Term).

had asserted that Western Shoshone aboriginal title to the lands they occupied remained unextinguished. But the district court held that this contention was barred by the collateral estoppel effect of the Indian Claims Commission's 1962 ruling that the United States had extinguished the aboriginal title of the Western Shoshones to their former lands in Nevada. *United States* v. *Mary Dann and Carrie Dann*, Civ. No. R-74-60 BRT (D. Nev. Jan. 5, 1977).

The court of appeals reversed, *United States* v. *Dann (Dann I)*, 572 F.2d 222 (9th Cir. 1978). The court of appeals held that res judicata (claim preclusion) had no application because the Claims Commission's ruling was interlocutory (572 F.2d at 225). In that connection the court of appeals observed that the statutory finality provision of the Indian Claims Commission Act, § 22(a), 25 U.S.C. (1976 ed.) 70u(a), did not become operative until a final judgment was entered and payment made (572 F.2d at 226). The court of appeals also held that collateral estoppel (issue preclusion) did not bar litigation on the extinguishment question, asserting that "[w]hatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation before the [Commission], the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided" (572 F.2d at 226-227 (footnote omitted)). The trespass case was accordingly remanded to the district court for further proceedings.

5. In the meanwhile the Commission proceedings continued to move forward. In November 1976, the Temoak Band, which had retained new counsel, reversed its long-held position and moved the Commission to stay all proceedings pending a determination elsewhere of the Western Shoshones' claim that they

still retained aboriginal title to their former territory in Nevada. The attempt to delay the Commission proceeding, however, proved futile. On August 15, 1977, the Commission denied the Western Shoshones' motion for a stay and entered final judgment, awarding them in excess of $26 million. *Western Shoshone Identifiable Group* v. *United States*, 40 Indian Cl. Comm'n 305 (1977).

The Court of Claims affirmed. *Temoak Band of Western Shoshone Indians* v. *United States*, 593 F.2d 994 (1979). The court "assume[d] that the Temoaks really desire to sweep the water back under the bridge, and that they have employed new counsel to assist them in this endeavor" (593 F.2d at 997). But the court emphasized the tardiness of the stay application that effected an abrupt reversal of over 25 years of litigation strategy by the Western Shoshones. And the Court of Claims observed that the Shoshones were not willing simply to abandon their claim outright. In these circumstances, the Court of Claims concluded that to "sidetrack[]" the case in the manner proposed "would have been contrary to the statutory procedure under which the suit was brought, the intent and purpose of the Act, and the duty of the federal judicial system to employ its resources economically as well as to achieve the ends of justice speedily" (593 F.2d at 998-999). The court added (*id.* at 999): "If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress * * *".

The Court of Claims noted (593 F.2d at 999), however, that subsequent to its prior decision upholding the denial of Shoshone dissidents' motion to intervene (see page 9, *supra*), Congress had amended the standing appropriation covering Court of Claims judgments, 31 U.S.C. 724a, so as to extend its coverage to Indian Claims Commission judg-

ments. Accordingly, the Court of Claims observed, it no longer remained possible for the Western Shoshones to forestall operation of the preclusion provision of the Indian Claims Commission Act, Section 22(a), simply by persuading Congress to defer an appropriation, because the judgment would automatically be paid. Compare page 9 note 6, *supra*. But the Court of Claims emphasized that even after the judgment fund had been appropriated, Congress's plenary power to deal with Indians was sufficient to allow it to adjust the relations between the Western Shoshone and the United States in whatever manner it might deem appropriate, explaining (593 F.3d at 999): "The essential point of the matter is that the [Western Shoshones'] true appeal is to legislative grace, not as of right to this court."

This Court again denied certiorari. 444 U.S. 973 (1979). Although the Court of Claims had entered a temporary stay of its final order so as to allow the Secretary of the Interior to consider whether to support legislation establishing a reservation for the Western Shoshones, the stay was allowed to expire. The Secretary subsequently announced that he would not undertake an effort to establish a reservation.

On December 6, 1979, the Clerk of the Court of Claims certified the Commission's final award to the General Accounting Office for payment. On December 19, 1979, the General Accounting Office certified to the Treasury that the sum of $26,145,189.89 was due from the United States on account of the judgment in the claims proceeding. Pursuant to the amended 31 U.S.C. (Supp. V 1981) 724a, the award was thereupon automatically appropriated and was paid into a trust account in the United States Treasury for the tribal claimant. See *Western Shoshone Identifiable Group* v. *United States*, 652 F.2d 41, 43

(Ct. Cl. 1981).[8] The funds have been invested and the earnings credited to the claimant's account (*id.* at 50).

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[8] The cited case, the third decision of the Court of Claims in the claims proceedings initiated by the Western Shoshones, addressed the award of attorneys fees to be paid to the attorneys who represented the Western Shoshones in those proceedings. In this last round of the claims litigation, the Court of Claims rejected the contention of the various Shoshone organizations (including the Western Shoshone Sacred Lands Association, which has participated in this case as amicus curiae (see Am. Br. of Western Shoshone Nat'l Council 2)) that fees should be denied to the attorneys responsible for the award of over $26 million. After carefully reviewing the course of the claims proceedings, 652 F.2d at 43-46, the Court of Claims explained that the central premise of the opposition to the award of attorney's fees—that "certain lands on which [the Western Shoshones] had a right of occupation and use were actually not 'taken'" (652 F.2d at 47) is:

> identical to that previously asserted and rejected both before the Indian Claims Commission and this court. It has been finally determined in this litigation that the [Western Shoshones'] lands were taken by March 3, 1853 (California area) and July 1, 1872 (Nevada area). This is the law of this case and cannot be ignored, evaded or relitigated in the process of determining the amount, if any, of attorneys' fees and expenses which are to be paid. [*Id.* at 46.]

The Court of Claims recognized the existence of dissension among the Western Shoshones as to the wisdom of the course of litigation that had been followed, but explained (652 F.2d at 47) that

> this situation was addressed in the prior decisions rendered in this matter and ruled not to constitute a valid basis for reopening or rejecting the determinations made, including those as to the taking of the land. Instead these determinations have been affirmed.

In its decision on attorney's fees the Court of Claims also addressed the 1980 district court decision in the instant trespass case which had, by then, been entered, and which suggested that the Western Shoshones' aboriginal title had not

6. On April 25, 1980, the district court entered a final judgment in the *Dann* trespass case (Pet. App. 30a-32a). The district court, observing that this Court had denied certiorari in the claims proceedings and that the Commission's award had been certified for payment, held that the judgment of the Commission had become final and that "[t]he legal effect of the judgment for the purposes of the instant case is to extinguish the aboriginal Indian title to the lands of the Western Shoshone Indians upon which [respondents] assert the right to graze livestock * * *" (Pet. App. 31a). The court stated, however, that respondents had not been in trespass before December 6, 1979, because "[u]ntil the Indian Claims Commission judgment became final, such aboriginal Indian title had not been extinguished" (*ibid.*).[9] The district court accordingly granted the government's request for injunctive relief but denied damages for past trespasses (*ibid.*).

Both parties disagreed with the district court's disposition and reasoning. Cross-appeals were taken. Respondents argued that collateral estoppel had no application to the extinguishment issue. The government responded that because of entry of final judgment in the claims proceeding, both res judicata and collateral estoppel barred the respondents' assertion that the Western Shoshones retain aboriginal title to their former territory. In addition, because the award had been paid into a trust fund for the Western Sho-

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been extinguished prior to entry of the Indian Claims Commission's final award (see page 14, *infra*). The Court of Claims explained (652 F.2d at 47) that this aspect of the district court's ruling was "not in accord with the final determination reached" in the claims proceedings.

[9] No findings of fact or conclusions of law were entered to support this determination.

shone claimants, the government relied upon the preclusive effect of Section 22(a) of the Indian Claims Commission Act, which provides that "payment of any claim" determined by the Commission "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."

On its cross-appeal, the government argued that the Claims Commission decision and award established that extinguishment of the aboriginal title had occurred in the past, not merely as of the date of payment of the claims award, and barred relitigation of this issue. The government also argued that, assuming the issue was open for redetermination, various discrete federal actions had in fact extinguished aboriginal title long before initiation of the claims proceeding.[10] Respondents challenged the government's extinguishment arguments, and denied that any preclusion doctrine was applicable. With regard to the effect of Section 22, respondents contended on appeal (for the first time in the litigation) that the award had not been "paid" within the meaning of that Section because, although it had been deposited into the Treasury on behalf of the Western Sho-

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[10] In *Northwestern Bands of Shoshone Indians* this Court stated (324 U.S. at 346) that the United States

> has treated * * * Shoshone territory as a part of the public domain. School lands were granted. 13 Stat. 32; 26 Stat. 216; 28 Stat. 109. National forests were freely created. 33 Stat. 2307; 34 Stat. 3099, 3198, 3206, 3247, 3251; 37 Stat. 1678. The lands were opened to public settlement under the homestead laws. Report of the Commissioner of the General Land Office (1868), pp. 55, 59, 63; Report of the Commissioner of the General Land Office (1869), pp. 163, 168, 177. Thus, we have the administration of this territory by the United States proceeding as though no Indian land titles were involved.

shones, it had not yet been distributed to individual Western Shoshones pursuant to the Distribution of Judgment Funds Act (DJFA), 25 U.S.C. 1401 *et seq.*

b. The court of appeals reversed, ruling in favor of respondents on all issues (Pet. App. 1a-29a). Adhering to the alternative ground for its decision in *Dann I*, the court of appeals held that collateral estoppel was inapplicable to the extinguishment issue, stating that the extinguishment issue had not actually been litigated in the claims proceeding (Pet. App. 5a-7a). The court of appeals also declined to apply res judicata, reasoning that Section 22(a) of the Indian Claims Commission Act was intended to exhaustively set forth "the entire bar effect of a favorable claim determination" and thus to supplant the judge-made claim preclusion doctrine (Pet. App. 7a-10a).

But the court of appeals also found the statutory bar of Section 22(a) inapplicable (Pet. App. 10a-16a). The court acknowledged (*id.* at 10a-11a) that the award had been automatically appropriated and had been credited to an interest bearing Treasury account in the name of the Western Shoshones. Nevertheless, because the funds had not been distributed to individual Western Shoshones, or applied to collective tribal purposes pursuant to the DJFA, the court concluded that the Western Shoshones' claim had not been paid for purposes of the statutory preclusion provision. The court's reasoning rested in part upon the view that the ordinary meaning of "payment" does not comprehend a "transfer of funds that leaves such significant legal blocks in the way of delivery to the payee" (Pet. App. 12a). But the court purported to rest its interpretation of Section 22(a) primarily upon the Court of Claims' comment, in its 1976 decision in *Western Shoshone Legal Defense & Education Ass'n* (see page 9 note 6, *supra*), that because the bar of Section 22 would not fall until payment of the claim was made, the majority of the Western Shoshones, if so inclined, could still seek, after entry of a final judgment, to have Congress defer an appropriation, thereby averting preclusion.

The court of appeals recognized (Pet. App. 13a-14a) that this comment was based upon the fact that, as of 1976, no standing appropriation had been made applicable to judgments of the Claims Commission, and that Congress had subsequently made explicit provision for just such an arrangement. Yet the court refused to "conclude * * * that Congress by its change in the appropriation process intended to yield its final authority to affect the nature of an award before it acquires bar effect under section 70u" (Pet. App. 13a). Reasoning that the purpose of automatic appropriation of judgments was purely to eliminate a ministerial task, the court of appeals decided that Congress must have intended that the "payment" bar of Section 22 not go into effect until a plan for distribution of the judgment fund had been approved by Congress pursuant to the Distribution of Judgment Funds Act (Pet. App. 12a, 13a-14a).

The court of appeals acknowledged that the Court of Claims had used language in its 1979 decision in *Temoak Band of Western Shoshone Indians* (see pages 11-12, *supra*), that "does suggest that," as a result of the intervening amendment to the standing appropriation act for judgments, "payment might take place in the absence of congressional action" (Pet. App. 15a). But because the Court of Claims had observed that the Western Shoshones could seek relief from Congress to preserve its title claim even after

the claims judgment had been paid (see page 12, *supra*), the court of appeals chose to disregard the Court of Claims' interpretation of Section 22(a) itself, reasoning that "this channel of congressional relief is best kept open by an interpretation of section [22(a)] that does not bar collateral litigation, which might produce results highly informative in making its decision, until Congress has exercised its final discretion in dealing with the claim itself" (Pet. App. 15a).

The court of appeals also rejected each of the government's arguments that, wholly apart from any preclusive effect of the claims judgment or award, the aboriginal title of the Western Shoshones to the lands at issue here had in fact been extinguished (Pet. App. 16a-28a). The court held that neither opening of the former Shoshone lands to settlement under the homestead laws or other public land laws, the establishment of the Duck Valley Reservation for the Western Shoshone in 1877, the administration of the lands occupied by respondents (and much of the remaining lands covered by the claims proceedings) by the BLM pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, nor the cumulative impact of all of these developments was sufficient to extinguish the aboriginal title of the Western Shoshones to the lands that are the subject of the trespass action.

SUMMARY OF ARGUMENT

The deposit to the Western Shoshones' account of $26,145,189.89 appropriated by Congress in satisfaction of the Indian Claims Commission award for the extinguishment of Western Shoshone title to their former domain bars respondents' claim that the Western Shoshones retain unextinguished aboriginal title to the lands in controversy in this ejectment action. The funds thus appropriated and deposited

are now beneficially owned by the tribal group that brought the claims proceeding, rather than the United States, which has fully discharged its debt on the judgment and lost any beneficial interest in the funds used to satisfy that judgment. The United States, which holds the judgment fund solely as trustee for the Western Shoshones, may not convert, divert, diminish or mismanage these funds without incurring full monetary liability to the tribal owner. This transfer of ownership and the accompanying legal protections that render the Western Shoshones' interests secure establish that the claim determined in favor of the Western Shoshones by the Indian Claims Commission has been paid. Accordingly, under Section 22(a) of the Indian Claims Commission Act, the United States is entitled to a full discharge of any "claim[]" or "demand[] touching any of the matters involved in the [claims proceeding]." Respondents' claim that the Western Shoshones retain aboriginal title to the lands that are the subject of this ejectment action goes to the heart of the basis of the claims litigation and accordingly is precluded under a straightforward reading of the statutory bar. The court of appeals' contrary interpretation of the statute is insupportable.

1. Contrary to the court of appeals' view, distribution of the judgment fund to individual Shoshones forms no part of "payment" of the claim adjudicated by the Indian Claims Commission. That claim was maintained, as the Indian Claims Commission Act dictates, on behalf of a tribal group, the Western Shoshone Identifiable Group, rather than on behalf of any single individual or class of individuals. The resulting judgment fund, like the claim itself, belongs to the tribal entity and no individual Indian has any vested right therein. Thus payment

was complete upon satisfaction of the judgment in favor of the tribal claimant. Distribution of the judgment fund to individual Indians, if Congress prefers that approach to expenditure of the tribal fund upon projects for the benefit of the tribe as a whole, is an exercise of Congress's power, as trustee, over Indian tribal property, which exists wholly apart from the United States' debt—now discharged —to the tribal entity.

2. The court of appeals' interpretation of Section 22(a) robs the judgment of the Indian Claims Commission of finality and thrusts upon Congress the task of deciding the merits of the Western Shoshone claims. The court of appeals' decision disregards the language of Section 22(a) which equates "payment" with appropriation of the judgment. The statutory language reveals that Congress expected preclusion to take effect immediately upon appropriation without any intervening process of application or distribution of the judgment fund.

The court of appeals' reconstruction of the statutory scheme also flies in the face of the legislative history of Section 22(a). After careful consideration, Congress deliberately directed that Indian Claims Commission awards be treated as final judgments, rejecting arguments that it should reserve to itself the task of assessing the merits of underlying claims. Congress expected that the appropriation of funds in payment of such awards would be a routine ministerial task. The court of appeals thus erred in attributing to Congress the desire to preserve the opportunity for collateral litigation bearing upon the matters involved in the claims proceeding, so that it might consider the results of such litigation in connection with its appraisal of the claims award.

3. Statutory developments subsequent to the enactment of the Indian Claims Commission Act that

bear upon the appropriation and distribution of judgment funds lend no support to the court of appeals' reading of Section 22(a). In fact, there are numerous indications that Congress understood that judgments subject to distribution had already been paid and satisfied when appropriated and deposited to the Tribe's account.

a. Following enactment of the Indian Claims Commission Act, Congress recognized that the funds appropriated in satisfaction of the Commission's judgments were tribal funds. Eventually, Congress became concerned that the Secretary was too inclined to authorize pro rata distribution of tribal funds instead of applying the funds for collective benefit. Congress thus undertook supervision of the Secretary's application and distribution of these tribal judgment funds, and ultimately required that distribution be carried out pursuant to legislation. The numerous distribution Acts enacted in the 1960's and early 1970's invariably reflect Congress's understanding that the funds previously appropriated and deposited to the credit of the tribal claimant in the Treasury represented full satisfaction and payment of the underlying claims.

In 1973 Congress found that the burden of separately legislating to effect distribution of each tribal judgment was excessive and unwarranted. By adopting the Distribution of Judgment Funds Act, Congress transferred the laboring oar in this area back to the Secretary of the Interior while retaining a veto over distribution plans. But, as with the numerous distribution acts that came before it, the generic provisions of the DJFA and its legislative history reflect Congress's understanding that distribution took place separate from, and subsequent to, the payment of the Claims Commission award.

The final legislative development that the court of appeals thought relevant was the amendment in 1978 of the standing appropriations Act for judgments against the United States to cover Indian Claims Commission judgments. Although this change made it unnecessary for Congress to enact an appropriation bill to pay the judgment in cases such as this, there is no reason to conclude that Congress meant to create some new mechanism—albeit unspecified—for reviewing Indian claims that had gone to judgment before such judgments acquired preclusive effect. Congress never intended that the appropriations process serve as a court of last appeal from the decisions of the Claims Commission and Court of Claims. Thus Congress, in extending the standing appropriations mechanism, simply relieved itself of an essentially ministerial chore, and did not convert the distribution process contemplated under the DJFA into a form of legislative review of Indian claims.

ARGUMENT

THE DEPOSIT OF FUNDS SATISFYING THE INDIAN CLAIMS COMMISSION AWARD INTO A TRUST ACCOUNT FOR THE WESTERN SHOSHONES BARS RESPONDENTS FROM ASSERTING THAT THE SHOSHONES RETAIN ANY INTEREST IN THE LANDS COVERED BY THE AWARD

Section 22(a) of the Indian Claims Commission Act provides, in relevant part:

> The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

This statutory language bars respondents' assertion of Western Shoshone title as a defense to the present

ejectment action. As the court of appeals acknowledged (Pet. App. 10a-11a, 13a), "[t]he amount of the [Indian Claims Commission] award [w]as * * * credited to a Treasury account for the benefit of the Western Shoshone" in December 1979 pursuant to 31 U.S.C. (Supp. V 1981) 724a, which provides for automatic appropriation of funds in satisfaction of Indian Claims Commission awards. As a consequence of this transfer, the Western Shoshones have acquired a vested property right to the beneficial ownership of the judgment fund. The United States may not convert the trust fund to its own purposes without incurring a Fifth Amendment obligation to pay just compensation to its rightful owner, the Western Shoshones. See *United States* v. *Sioux Nation*, 448 U.S. 371, 408-409 (1980); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937). Moreover, as the Western Shoshone Nat'l Council concedes (Am. Br. in Opp. 15-16), the United States may generally be held accountable, as a trustee, for mismanagement of the trust fund. See *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 19; *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); *Angle* v. *United States*, 709 F.2d 570, 574-575 (9th Cir. 1983); *Rogers* v. *United States*, 697 F.2d 886, 890 (9th Cir. 1983).[11] The United States is also obli-

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[11] In light of *Mitchell*, *Angle* and *Rogers*, the reliance of the Western Shoshone National Council (Am. Br. in Opp. 14 n.14) on *Whiskers* v. *United States*, 600 F.2d 1332 (10th Cir. 1979), cert. denied, 444 U.S. 1078 (1980), is misplaced. We note that the court of appeals in *Whiskers* agreed that the United States generally is liable for damages for failure properly to perform fiduciary obligations as to property held in trust, thereby anticipating in that respect this Court's decision in *Mitchell*. The result in *Whiskers* rests upon the court's conclusion that the funds there involved were not, in fact, held subject to trust obligations. That conclusion rested upon reason-

gated to earn interest upon such tribal funds. See 25 U.S.C. 161, 161a, 162a; *United States* v. *Mitchell*, slip op. 17 n.24, 18 n.29.

In short, the beneficial interest in the funds appropriated in satisfaction of the Indian Claims Commission award nas been shifted from the United States to the Western Shoshone Indians. At the time that shift occurred, in December 1979, the role of the government with respect to the funds involved was converted from that of the Indians' judgment debtor to its familiar one of trustee of Indian property. See *Sioux Nation*, 448 U.S. at 407-409; *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 85-86 (1977). Conversely, the Western Shoshones were no longer judgment creditors of the United States; rather the judgment had been satisfied, and beneficial ownership of the judgment fund was theirs.[12] In sum, the "claim" that had been "determin[ed] in accordance with" the Indian Claims Commission Act had been paid. Pursuant to Section 22(a) of that Act the United States was thereupon entitled to "full discharge," not only of its obligation to pay the award of the Commission, but, as

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ing not advanced by the government. See 600 F.2d at 1336. In any event, to the extent *Whiskers* requires an express statutory declaration of trust as a prerequisite to holding the United States answerable in damages, it is inconsistent with the general rule stated in *Mitchell*, slip op. 19.

[12] Amicus Western Shoshone National Council argues (Am. Br. in Opp. 14) that "[t]he inquiry must be, at what point has the United States satisfied its liability to the claimants by paying them the money to which they are entitled * * *." Except for the use of the plural to describe the claimant, the Western Shoshone Identifiable Group, we do not disagree with this formulation. See pages 27-28, *infra*. The point, however, is that the United States has discharged its liability under the Indian Claims Commission's award.

well, of "all claims and demands touching any of the matters involved in the controversy."

In this ejectment action the respondents' defense to the United States' claim is, in their own words, "an assertion of Western Shoshone title" (Br. in Opp. 2) to lands which undisputedly formed part of the area covered by the award of the Indian Claims Commission. See also page 4, *supra*. By any standard, this is a "claim" or "demand" that touches intimately upon the matters at issue in the claims proceeding. Accordingly, payment of the judgment fund into a trust account for the Western Shoshones bars respondents' assertion of subsisting Western Shoshone title to the lands in contention here.

The court of appeals did not suggest that the payment bar of Section 22(a) has no application to this ejectment action; rather it plainly understood that upon payment of the claim, the defense to ejectment would be barred (see Pet. App. 11a, 15a-16a). However, while labeling the question "a close one" (*id.* at 11a), the court of appeals held that the Western Shoshone's claim has yet to be paid, reasoning that "payment" for purposes of Section 22(a) does not occur until such time as a plan for distribution of the judgment fund to individual Indians is "actually put into effect" (Pet. App. 11a-12a).[13]

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[13] The court of appeals thus defined the event of payment somewhat imprecisely. Elsewhere it stated that payment occurs when Congress "has either permitted a plan of distribution to become effective pursuant to 25 U.S.C. 1403 or has legislated one" (Pet. App. 12a; see also Pet. App. 16a, using similar language). It thus appears that the court of appeals would define as "payment" the adoption of a legally effective scheme for distributing the tribal judgment funds to individuals, rather than some step in the implementation of such a plan. In any event, however the court of appeals' ruling may be construed, for the reasons discussed in the text it does not accord with the statutory scheme.

The court of appeals offered two primary reasons for declining to recognize that the Western Shoshones' claim has been paid. First, the court suggested that prior to establishment of a plan for distribution of the judgment fund, the "ordinary meaning" of payment is not satisfied because of what it perceived to be "significant legal blocks in the way of delivery to the payee" (Pet. App. 12a). Second, the court of appeals reasoned (Pet. App. 15a-16a) that it would be better policy to allow "collateral litigation" as to the continuing existence of Western Shoshone aboriginal title, "which might produce results highly informative to Congress," to go forward, so that Congress could take those results into account in legislation. The court of appeals thus chose to interpret Section 22(a) to defer the finality of payment until Congress acts with respect to a distribution plan. The flaw in this reasoning is apparent. The court of appeals failed to recognize that the "claim" at issue is tribal rather than individual, and accordingly proceeds upon a mistaken theory as to the identity of the "payee." And the court of appeals fails to observe the fundamental distinction between the role of the government as a judgment debtor upon a claim adjudicated adversely to the United States, and the analytically distinct capacity of the United States as trustee of the tribal judgment fund created by payment of such a judgment. Moreover, the court of appeals' reconstruction of the statutory scheme created by the Indian Claims Commission Act and related legislation so as to "preserve" for Congress the opportunity to take a final look at the merits of the claim is contrary to the language, legislative history and purpose of that Act, and is unsupported by the Distribution of Judgment Funds Act.

1.a. Contrary to the view of the court of appeals, the fact that the judgment fund has yet to be distributed to individual Western Shoshones has no bearing upon the question whether the Western Shoshones' claim adjudicated by the Indian Claims Commission has been paid. Indeed, the court's suggestion that the absence of a distribution plan is a "legal block[] in the way of delivery to the payee" (Pet. App. 12a) confirms that the court of appeals has misapprehended both the nature of the "claim" to be paid and the identity of the "payee." It is accordingly unsurprising that the court of appeals also mistook the meaning of payment under Section 22(a).

The Western Shoshones' suit seeking compensation for the extinguishment of their aboriginal title, maintained by them for more than a quarter-century against the United States pursuant to the Indian Claims Commission Act, was not an action for compensation upon an aggregation of separate, but related, individual claims. Rather, it was an action seeking an award on behalf of a common tribal entity, the Western Shoshone Identifiable Group, that was recognized by the Indian Claims Commission. See page 6, *supra*. See *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. at 85; *Fort Sill Apache Tribe* v. *United States*, 477 F.2d 1360, 1362 (Ct. Cl. 1973), cert. denied, 416 U.S. 993 (1974); *Minnesota Chippewa Tribe* v. *United States*, 315 F.2d 906, 913-914 (Ct. Cl. 1963).

As this Court explained in *Weeks* (430 U.S. at 85):

> It was th[e] tribal entity, represented * * * before the Indian Claims Commission [by a representative party], that suffered from the United States' breach, and both the Commission award and the appropriation by Congress were the means of compensating that tribal entity for

> the wrong done to it. Indeed, the Indian Claims Commission is not empowered to hear individuals' claims, but may only adjudicate claims held by an "Indian tribe, band, or other identifiable group." 25 U.S.C. §§ 70a, 70i [additional citation omitted].

Here, as in *Weeks*, the claim belonged to the tribal entity. Likewise here, as there, the "appropriated funds" which are "the means of compensating that tribal entity" are "tribal property" in which "individual Indians [hold] no vested rights" (430 U.S. at 85).

Because the claim covered by Section 22(a) is the Western Shoshones' tribal claim, upon which only the tribal entity is the proper payee, payment was accomplished for purposes of Section 22(a) when beneficial ownership of the judgment fund was transferred to the Western Shoshones in December 1979. Distribution of the tribal fund to individual Western Shoshones forms no part of the process of payment of the government's judgment debt to the Shoshones. Rather, upon payment to the tribe, the judgment fund became "tribal property" (*Weeks*, 430 U.S. at 85), which, like all Indian tribal property, is "subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes" (*ibid.*).[14] The distribution process (see pages 38-43, *infra*) is simply an expression and application of that authority over tribal property. Its pendency accordingly is not in any respect inconsistent with the status of the Western Shoshone claim as one that has been paid. Indeed, absent payment of the tribal claim there would be nothing to distribute.[15]

[14] This authority is " 'drawn both explicitly and implicitly from the Constitution itself' * * * [and] 'has been termed one of the most fundamental expressions, if not the major expression, of the power of Congress over Indian affairs . . . .' " *Weeks*, 430 U.S. at 85-86 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), and F. Cohen, *Handbook of Federal Indian Law* 94, 97 (1942)).

b. The court of appeals' decision also appears to have been influenced by the fact that the trust fund containing the proceeds of the claims litigation is on deposit in an account in the United States Treasury, and has not been released directly to the Western Shoshone group (Pet. App. 11a).[16] The inference drawn by the court of appeals that the judgment has, for these reasons, not been paid is simply incorrect. As previously noted (see pages 23-24, *supra*), and as the Western Shoshone Nat'l Council acknowledges (Am. Br. in Opp. 15-16), the United States does not hold the judgment fund as a beneficial owner, but serves as trustee for the Western Shoshones, the beneficial owner. And the terms of that trusteeship, which include legal liability for conversion or mismanagement of the tribal funds, as well as the obligation to make the funds productive, confirm that the ownership interest of the Western Shoshones in

[15] Because the claim—and the resulting judgment fund—belong to the tribal entity and not to any particular individuals, it is wholly irrelevant to the question presented that the membership of the Western Shoshone Identifiable Group has yet to be authoritatively defined. Likewise, it is irrelevant to the question presented here that respondents may or may not share in any distribution plan established. Compare Br. in Opp. 7; Western Shoshone Nat'l Council Am. Br. in Opp. 15. The payment bar of Section 22(a) is applicable here without regard to any share respondents may receive in the judgment fund because the respondents' defense to this ejectment action rests upon an assertion of subsisting Western Shoshone tribal title. See page 25, *supra*.

[16] In point of fact, the judgment fund has been invested outside of the Treasury pursuant to 25 U.S.C. 162a. See page 13, *supra*.

the judgment fund is both secure and concrete. See pages 23-24, *supra*.

Nor is there anything unusual about the fact that the Western Shoshones' funds are presently held in trust, rather than released directly to some tribal entity.[17] It is commonplace for the United States to serve as trusteee of Indian property—real or personal. See *United States* v. *Mitchell*, slip op. 19; *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-117 (1938) (recognized title to land); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974) (aboriginal Indian title to land); 25 U.S.C. 348. In doing so, the United States is simply exercising its authority to govern the management and distribution of such Indian property. See page 28 & note 14, *supra*.

2. The court of appeals' conclusion that, as a matter of policy, the payment bar of Section 22(a) should be interpreted to permit litigation of the question whether Western Shoshone aboriginal title has been extinguished in this case, is contrary to the language, legislative history and purpose of Section 22(a). Consideration of these materials compels the conclusion that the tribal claim of the Western Shoshones has been paid.

a. The plain language of Section 22(a) requires the conclusion that the appropriation of funds in satisfaction of the Western Shoshone award constituted the "payment" of the claim, which in turn had the

[17] As respondent acknowledges (Br. in Opp. 7; see also Western Shoshone Nat'l Council Am. Br. in Opp. 2, 15), there is no organized tribal entity that corresponds directly to the Western Shoshone Identifiable Group, which is the beneficial owner of the award in the claims proceedings. It is accordingly especially unpersuasive in this case to attribute any significance to the fact that the judgment fund has been held in trust, rather than released directly to the beneficiary.

effect under Section 22(a) of precluding any further claims and demands against the United States touching upon any of the matters involved in the Western Shoshone suit. The first paragraph of Section 22(a) provides that a report of the Commission to Congress determining that a "claimant"—*i.e.*, a tribal entity—is entitled to recover is deemed a "final judgment" of the Court of Claims. That initial paragraph further "authorize[s] to be appropriated such sums as are necessary to pay the final determination of the Commission." The statutory language thus directly equates appropriation of the amount of an award with payment thereof. This equation is confirmed by the absence from Section 22—and the Indian Claims Commission Act as a whole—of any special provision to compel delivery of appropriated funds to any tribal government entity of the claimant or to regulate distribution to individual tribal members. Rather, Congress plainly assumed that payment of a tribal or group claim was complete upon appropriation to the account of the tribal group and presumed that the use or distribution of the tribe's funds was governed by existing law. See pages 38-43, *infra*.

Indeed, immediately following the language authorizing appropriations, the second paragraph of Section 22(a), directly relevant here, provides that the "payment of any claim" after its determination by the Commission shall be a full discharge of the United States of all claims or demands relating to the controversy. Absent any specialized statutory directive governing the use or distribution of appropriated tribal judgment funds, that process might take considerable time and might not have any clearly demarcated ending point. Thus, it is apparent that the statutory design does not contemplate that

any further steps be completed following appropriation of the tribal judgment fund in order to effect "payment." It is instead clear that the "payment" of the "claim" occurs at the point of the appropriation mentioned in the first paragraph of Section 22 (a) and the resulting deposit of the sums involved in a special account for the tribal claimant's benefit. Congress plainly assumed that payment of a claim was complete when these events had occurred, making the judgment fund "tribal property" (*Weeks*, 430 U.S. at 85), subject, of course, to the usual exercise by Congress of its separate authority, as trustee, to govern distribution and management of such Indian property. See page 28, *supra*. There is simply no suggestion in the statutory text or legislative history of the Indian Claims Commission Act that any departure from this established pattern was contemplated.[18]

[18] The Western Shoshone National Council appears to suggest (Am. Br. in Opp. 13-14) that the use of the phrase "necessary to pay" in the first paragraph of Section 22(a) indicates that payment occurs at some time after the judgment fund has been appropriated and credited to the claimant's account. The argument overlooks the fact that the phrase "necessary to pay the final determination of the Commission" is employed as a measure of the statutory authorization for appropriations. Thus, the argument establishes at most that payment occurs subsequent to the *authorization* for appropriations—which was provided in 1946 by the Indian Claims Commission Act—a point about which there is no dispute. In any event, we need not rely on the first paragraph of Section 22(a), standing alone, to establish conclusively that payment occurs upon appropriation of the judgment fund to be credited to the claimant's account. As explained in the text, the absence of any provision for distribution of a tribal judgment fund, coupled with the juxtaposition of the authorization for appropriations with the payment bar provision, confirms that "payment" occurs when the tribe has become the owner of the judgment fund.

b. The legislative history of the Indian Claims Commission Act confirms that Congress did not intend to reserve to itself the opportunity to take a "final look" (Pet. App. 12a) at the merits of the underlying claim that the court of appeals' decision "preserves" by treating a judgment as unpaid until a distribution plan is accepted by Congress. Therefore, by thrusting upon Congress responsibility for deciding whether the payment bar of Section 22 should be raised against the Western Shoshones' claim that they retain aboriginal title, the court of appeals' decision frustrates a fundamental purpose of the Indian Claims Commission Act.

One of the key objectives of that Act was to relieve Congress of the burden of assessing the merits of Indian claims, as it previously had done by considering the requests of various tribal entities for passage of special jurisdictional acts. See H.R. Rep. 1466, 79th Cong., 1st Sess. 6 (1945). To allow collateral litigation to go forward here upon an issue central to the Indian Claims Commission proceedings on the theory that the "results" would be "highly informative to Congress" (Pet. App. 15a) plainly disregards the considered congressional judgment embodied in the Act.

Indeed, the legislative history shows that Congress deliberately rejected the suggestion that it retain for itself plenary authority to review the claims, treating the Commission's decisions as mere recommendations. Congress adopted instead the language of Section 22(a), which treats the decision of the Commission "as a final judgment of the Court of Claims" payable subject only to the formality of the appropriations process.

The House bill, H.R. 4497, 79th Cong., 1st Sess. (1945), provided that the report of the Indian Claims

Commission, filed with Congress, "shall have the effect of a final judgment and shall be paid in like manner as are judgments of the Court of Claims" (§ 22; see 92 Cong. Rec. 5322 (1946)). The House Report also reflects Congress's expectation that a Claims Commission award would be "treated as a final judgment" and be routinely paid "in like manner as are judgments of the Court of Claims" (H.R. Rep. 1466, *supra*, at 13). Significantly, the Department of Justice criticized this provision, arguing that "[i]n view of the vague basis upon which many of the claims presented to the Commission would be predicated" the "provision making the findings of the Commission binding upon Congress would constitute a surrender by Congress of its very necessary prerogative to sift and control this unusual type of claim against the Government" (*id.* at 17). The House of Representatives, however, was unpersuaded. While its Report observed that Congress would retain its traditional power to make or withhold appropriations to pay a judgment, it also emphasized that "the question of the merits of any case is left to the Commission and the courts" and noted its expectation that appropriations would be routinely made. *Id.* at 10, 13; see also 92 Cong. Rec. 5313 (1946) (remarks of Rep. Jackson).

The Senate was somewhat more receptive to the Department of Justice argument and deleted the language of the House bill that provided that the Commission's report should have the effect of a final judgment and should be paid like any other Court of Claims judgment. See S. Rep. 1715, 79th Cong., 2d Sess. 6 (1946); 92 Cong. Rec. 9218 (1946). But the Senate version was rejected by the Conference Committee, which adopted the present statutory language "[i]n order to make perfectly clear the intention of both houses that the determinations of the

Commission should, unless reversed, have the same finality as judgments of the Court of Claims." H.R. Rep. 2693, 79th Cong., 2d Sess. 8 (1946). The statutory authorization for appropriations found in the first paragraph of Section 22(a) was added to make this purpose clear (*ibid.*).

The upshot is that in 1946 Congress meant to reserve to itself only the routine exercise of its authority to make appropriations. Congress did not contemplate that it would examine the merits of claims proceedings at this juncture. The court of appeals' decision thus would rewrite the Indian Claims Commission Act, adopting a regime that Congress deliberately rejected.[19]

Congress' intention to put an end to lingering Indian land disputes by enactment of the Indian Claims Commission Act is thus clear. Indeed, the House Report flatly asserts that "the chief purpose of the present bill [is] to dispose of the Indian claims problem with finality" (H.R. Rep. 1466, *supra*, at 10). As the Court of Claims remarked in *Temoak*

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[19] Amicus Western Shoshone National Council asserts (Am. Br. in Opp. 16) that the court of appeals did not hold that Congress should be given a final look at the merits of the underlying claim before payment occurs, but only that Congress must act on a distribution plan before "payment" takes place. The amicus reads the court of appeals' opinion too narrowly. The *reason* assigned by the court of appeals for holding that payment does not occur until a distribution plan has been approved is that "to permit collateral pursuit of the Western Shoshone claims to continuing aboriginal title" might "produce results highly informative to Congress" (Pet. App. 15a). It would make no sense to allow litigation on the aboriginal title question to go forward so as to "inform[] • • • Congress" unless it were thought that Congress intended to consider such matters prior to giving finality effect to judgments of the Commission.

Band of Western Shoshone Indians v. *United States*, 593 F.2d at 998:

> There can be no doubt that Congress passed the Indian Claims Commission Act * * * with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all. * * * [20] It provided in Section 22 that payment of a claim as assessed under the Act would discharge not only the specific claim made, but all claims and demands touching any of the matters involved in the controversy. The object was not pecuniary * * *. Congress had long-term political objects, in the non-pejorative sense of the word "political," that are frustrated by continued delay * * *.

Against this background, the only sensible construction of Section 22 is that the preclusive effect of the Commission's judgment arises at the definite and readily ascertainable point when that judgment is satisfied by an appropriation of funds and all proceedings under the Indian Claims Commission Act itself are therefore terminated, rather than at some unspecified and indefinite future date when a distribution of the tribal award to those deemed eligible to share in it might be made pursuant to some *other* statute or other authority. Section 22 was intended to protect the United States from further claims or demands by the claimant in Commission proceedings, the interested Tribe, and persons, such as respondents herein, claiming through the Tribe. The protection logically should be afforded when the United States has fully discharged its obli-

[20] The Court of Claims remarked here (593 F.2d at 998) that Congress "may even have been so optimistic as to hope to have this accomplished in the lifetimes of persons then living."

gations under the Act to the claimant (see page 24 & note 12, *supra*).

Our straightforward interpretation of Section 22(a) is consistent, moreover, with this Court's recent reaffirmation of the special rigor with which the policies of preclusion are to be applied in matters involving title to land. "Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open." *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 13. Indeed, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 17-18 n.10. The decision of the court of appeals, which invites the wholesale litigation of subsisting Indian title to land where compensation has been awarded for extinguishment of that title, and which robs of practical effect the statutory bar to such litigation, cannot be reconciled with this teaching. The court of appeals' decision gratuitously casts a cloud of uncertainty upon federal (and private) titles to land in a vast area of more than 22 million acres.[21]

[21] The insult to judicial economy and values of repose resulting from the court of appeals' decision is two-or threefold. Not only was the extinguishment issue decided at the outset in the claims proceedings, see page 7, *supra*, but the Claims Commission and the Court of Claims repeatedly reaffirmed that that was so, in the face of the contrary assertions of respondents and others. See pages 8-9 and page 13 note 8, *supra*. Moreover, the Commission and the Court of Claims have repeatedly determined that there is no legal basis for the claim that the claims judgment was improperly obtained by claims counsel acting contrary to the wishes or instructions of the Western Shoshones. See pages 8-9 and page 13 note 8, *supra*.

3. The court of appeals seems also to have been of the view that legislative enactments pertaining to the appropriation of tribal judgments and distribution of judgment funds subsequent to the Indian Claims Commission Act somehow lend support to its conception of the proper relationship between Congress and the claims proceedings before the Commission (see Pet. App. 13a-14a). A review of the pertinent legislation and its antecedents reflects that the court of appeals' assessment was erroneous.

a. Indian claims judgments obviously are different from most, if not all, other judgments of the Court of Claims in that they are made on behalf of a collective entity, and therefore pose questions of application or distribution. In the period following enactment of the Indian Claims Commission Act, as judgments were rendered, the Secretary of the Interior treated the judgment funds appropriated by Act of Congress, which were deposited to the credit of the tribe in the Treasury, as *tribal* property, which he, as fiduciary for the tribe, had authority to distribute or to apply for the benefit of the Tribe. See H.R. Rep. 93-377, 93d Cong., 1st Sess. 4 (1973); 119 Cong. Rec. 32075 (1973) (remarks of Rep. Meeds); see also 25 U.S.C. 118.[22]

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[22] 25 U.S.C. 118 provides:

> Payments to Indians from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law.

This statute confirmed the authority of the Secretary of the Interior to make provision for distribution of appropriated judgment funds. Respondents seize upon the use of the term "[p]ayments" in Section 118, arguing that "payment" for purposes of Section 22 of the Indian Claims Commission Act must likewise refer to payments to individual Indians (Br. in Opp. 4, 6). But Section 118, enacted in 1911 (Act of Mar. 3, 1911, ch. 210, § 28, 36 Stat. 1077), plainly has no bearing upon the interpretation of the term payment in later-enacted Section 22 of the Indian Claims Commission Act precisely because Section 118 addresses the distribution of funds to individual Indians, rather than the payment of tribal claims. Indeed, in stating that Section 118 "payments" are to be made out of "moneys appropriated by Congress in satisfaction of the judgment of any court," Congress plainly equated the appropriation of funds in the amount of the judgment to be held on a tribe's account in the Treasury with the "satisfaction" or payment of the judgment.

Congress became concerned, however, that in application of Indian judgment funds the Secretary had given undue emphasis to distribution of pro rata shares to individual tribal members and insufficient attention to expenditures for tribal development and education. H.R. Rep. 93-377, *supra*, at 4. Congress accordingly acted to oversee the Secretary's performance of his fiduciary duties. Beginning in 1963, the Interior Department Appropriations Act carried language that required the Secretary to submit distribution plans to Congress to allow it an opportunity to exercise a veto. See, *e.g.*, Department of the Interior and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-578, 76 Stat. 338. And commencing in 1965, this requirement was further stiffened by precluding distribution absent affirmative authorizing legislation. Department of the Interior and Related Agencies Appropriation Act, 1965, Pub. L. No. 88-356, 78 Stat. 276. Significantly, these appropriations riders were all phrased as restrictions upon the authority of the Secretary, otherwise recognized, to advance "*tribal* funds" to the beneficially interested tribe (emphasis added). In short, the appropriated judgment funds were regarded as tribal funds, albeit not

immediately subject to disposal by the tribe in an unfettered manner. Congress merely wished to oversee the Secretary's performance of his fiduciary duty to manage this tribal property.

b. Having asserted its authority to govern distribution in this manner, Congress imposed a substantial burden on itself, which grew as the number of claims judgments grew. Substantial numbers of distribution Acts were enacted, honeycombing the pages of the United States Code. These Acts uniformly reflect Congress's understanding that the funds subject to distribution had already been paid and the underlying judgment satisfied.[23] Ultimately, in 1973, Con-

[23] Among these distribution Acts was that governing the Indian Claims Commission award in favor of the Delaware Indians, at issue in *Delaware Tribal Business Comm.* v. *Weeks*, *supra*. That Act, 25 U.S.C. 1291-1297, provided for the distribution of "[t]he funds appropriated by the Act of December 16, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians," and thus equates appropriation of the judgment fund with payment. And the appropriation Act referenced itself provided funds "[f]or payment of claims" (Pub. L. No. 91-166, 83 Stat. 453) —language that is essentially identical to that employed in Section 22(a) to impart preclusive effect to a judgment upon "payment of any claim." The distinction between payment of a tribal claim, and distribution of a judgment fund to individuals thus recognized was also recognized by this Court in *Weeks*. There the Court stated (430 U.S. at 79 (emphasis added; footnote omitted)):

> Congress *appropriated* funds to *pay the* [Indian Claims Commission] *award* and *later* enacted [25 U.S.C. 1291-1297] providing for its distribution.

See also pages 27-28, *supra*.

Other distribution Acts enacted in this era also reflect Congress's understanding that Indian Claims Commission awards had been paid when the funds had been appropriated

gress found it necessary to shift much of the responsibility back to the Secretary by enacting the Distribution of Judgment Funds Act of 1973, 25 U.S.C. 1401 *et seq*. Under that Act, the Secretary was directed to develop distribution plans after consultation with the affected tribe or group, and to present them to Congress for its review. A plan so proposed would go into effect unless vetoed by Congress within 60 days.

and deposited to the credit of the claimant tribe in the Treasury. See, *e.g.*, 25 U.S.C. 565 (providing for distribution of "the funds appropriated in satisfaction of a judgment obtained by" the Klamath Tribe "and all other funds heretofore * * * deposited in the United States Treasury to the credit of the Klamath Tribe"); 25 U.S.C. 676a (providing for division of "the trust fund belonging to the Confederated Bands of Ute Indians appropriated by the Second Supplemental Appropriations Act, 1965, and deposited in the United States Treasury" pursuant to a final judgment entered by the Indian Claims Commission); 25 U.S.C. 781(c) (directing distribution of funds "appropriated * * * in payment of the judgment entered by the Indian Claims Commission" to the Creek Nation of Indians); 25 U.S.C. 963 (providing for distribution "[o]f the funds on deposit in the Treasury of the United States to the credit of the Omaha Tribe of Nebraska that were appropriated to pay a judgment by the Indian Claims Commission"); 25 U.S.C. 991 (providing for distribution of "all funds which were appropriated * * * in satisfaction of a judgment" in favor of the Cherokee Tribe); 25 U.S.C. 1012 (providing for distribution of "funds on deposit in the Treasury of the United States to the credit of the Snake or Paiute Tribe that were appropriated * * * in satisfaction" of a judgment of the Indian Claims Commission). Comparable language is found in 25 U.S.C. 1031, 1052, 1071, 1081, 1102, 1111, 1132, 1141, 1152, 1161, 1171, 1191, 1201, 1211, 1222, 1231, 1241, 1251, 1261, 1271, 1281, 1291, 1300, 1300b, 1300c, 1300d, and 1300e. The appropriations Acts that preceded these distribution Acts provided funds described as "[F]or payment of claims." See, *e.g.*, 66 Stat. 121; 74 Stat. 52; 75 Stat. 747; 79 Stat. 108.

Nothing in the language or the legislative history of the DJFA provides the slightest support for the court of appeals' view that adoption of a distribution plan is necessary to effect payment for the purposes of Section 22(a) of the Indian Claims Commission Act. Indeed, Section 1 of the DJFA, 25 U.S.C. 1401, describes the funds subject to the distribution mechanism as "funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Court of Claims in favor of any Indian tribe, band, group, pueblo, or community," thereby confirming that the appropriation of the judgment fund, in trust, for the tribal claimant was regarded as satisfaction of the judgment.[24] Furthermore, the title of the House Report describes the bill as "providing for the Distribution of Funds Appropriated in Satisfaction of Certain Judgments of the Indian Claims Commission * * *" (H.R. Rep. 93-377, 93d Cong., 1st Sess. 1 (1973)), and similar language is found in the body of the report (*id.* at 3). Moreover, the House Report makes clear Congress's understanding that:

> Funds appropriated to satisfy judgments of the Indian Claims Commission or the Court of Claims on behalf of Indian plaintiffs are deposited in the United States Treasury to the credit of the plaintiff tribe.

Id. at 4.

The DJFA was not intended to alter this arrangement in any respect. Rather, the new procedure was simply intended to be a more efficient means of deter-

[24] The generic provisions of the DJFA thus follow the pattern of the various special distribution acts adopted prior to 1973. See note 23, *supra*.

mining which individual Indians were to receive a share of the tribal trust fund and to relieve the Congress of the burden of primary responsibility for devising distribution plans. See S. Rep. 93-167, 93d Cong., 1st Sess. 2 (1973); H.R. Rep. 93-377, *supra*, at 4-5; 119 Cong. Rec. 32075 (1973) (remarks of Rep. Lujan). Congress plainly did not intend, by enacting the DJFA, to institute a new level of congressional review of the merits of the claims underlying appropriated judgments. The DJFA was intended to relieve Congress of a burden, not to create new legislative tasks.

c. As of 1973, it was still necessary for Congress to appropriate funds to pay a judgment entered by the Indian Claims Commission. This was true because Section 22 of the Indian Claims Commission Act merely authorized appropriations to pay judgments under the Act, but did not provide for automatic appropriations. Moreover, Section 1302 of the Supplemental Appropriations Act, 1957, ch. 748, 70 Stat. 694-695, as amended, 31 U.S.C. 724a, which established a standing or automatic appropriation to pay judgments of the Court of Claims, was at that time inapplicable to such judgments both because it was unclear whether they should be regarded as judgments of the Court of Claims, and because the automatic appropriation provision then applied only to awards not in excess of $100,000. See 31 U.S.C. (1970 ed.) 724a. In 1977, however, the $100,000 ceiling was eliminated by the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 96-97. See H.R. Rep. 95-68, 95th Cong., 1st Sess. 142, 182-183, 184 (1977); S. Rep. 95-64, 95th Cong., 1st Sess. 173, 204-206 (1977). And in 1978, the automatic appropriation was explicitly made applicable to judgments of the Indian Claims Commission by the Supplemental Appropriations Act, 1978, Pub. L. No.

95-240, 92 Stat. 116-117. See S. Rep. 95-564, 95th Cong., 1st Sess. 76-77 (1977); 31 U.S.C. (Supp. V 1981) 724a.

The combined effect of the 1977 and 1978 amendments to 31 U.S.C. 724a was to make it unnecessary for Congress to act to appropriate funds to pay judgments of the Indian Claims Commission. Rather, once the final award was certified by the Comptroller General in the General Accounting Office, the appropriation was automatic. The legislative history of the 1977 and 1978 amendments to Section 724a in no respect suggests that Congress intended to reserve to itself an opportunity to reconsider the claim by deferring the date of "payment" for purposes of Section 22(a) until the date a distribution plan became effective. Rather, Congress's sole concern was to dispense with a chore regarded as ministerial. H.R. Rep. 95-644, 95th Cong., 1st Sess. 53 (1977); S. Rep. 95-564, *supra*, at 76. It is simply irrational to suppose—as the court of appeals' analysis necessarily does—that the moment of "payment" somehow sprang from the point of appropriations to the point where a distribution plan was adopted, there being no hint in the legislative history of either the DJFA or the amendments to the standing appropriation Act that any such change was intended.

The court of appeals, however, reasoned (Pet. App. 13a-14a) that because Congress's expressed purpose for providing for automatic appropriations was simply to relieve itself of a routine legislative step, it could not conclude that Congress "by its change in the appropriation process intended to yield its final authority to affect the nature of an award before it acquires bar effect under [Section 22(a)]." This is simply circular reasoning. Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 23 n.34. Unless

one assumes that, prior to 1978, Congress intended to exercise authority to reconsider the underlying merits of a claim adjudicated by the Indian Claims Commission in connection with its action upon appropriations, there is no reason to expect the legislative history of the standing appropriations Act amendment to contain any evidence that Congress had affirmatively decided to abandon that practice. Because the legislative history of the Indian Claims Commission Act clearly demonstrates that Congress did not contemplate undertaking such review (see pages 33-35, *supra*), and there is no evidence that Congress routinely undertook such review in passing appropriations measures to pay Indian Claims Commission awards, the court of appeals' reasoning collapses.

d. There appears to be some suggestion in the court of appeals' opinion (see Pet. App. 14a-16a) that to raise the bar of preclusion here is somehow unfair because the Court of Claims, in its 1976 decision in *Western Shoshone Legal Defense & Education Ass'n*, 531 F.2d at 503 n.16, had indicated that Western Shoshones opposed to the presentation of the full tribal claim to the Indian Claims Commission proceedings could, by persuading Congress to defer an appropriation to pay an award by the Commission, avert the preclusive effect of Section 22(a), while pursuing collateral litigation. See page 9 note 6, *supra*. And respondents appear to suggest (Br. in Opp. 6, 8-9) that the bar of Section 22(a) should not apply here because they were entitled to pursue the strategy outlined by the Court of Claims. But none of this provides any basis for deviating from the statutory regime. As the Court of Claims observed in 1979, in *Temoak Band of Western Shoshone Indians*, 593 F.2d at 999, the Congress made

the payment bar of Section 22(a) automatic in operation by the 1978 amendment to the standing appropriation Act. Although this had the practical effect of eliminating a convenient vehicle that formerly had existed for the efforts of Western Shoshone to avert preclusion—congressional action upon an appropriations measure—the Court of Claims correctly observed that the power of Congress to grant (or deny) the Shoshones the relief sought was entirely unaffected (593 F.2d at 999):

> In view of its plenary power over Indian tribal property * * * we have no doubt that even after payment [congressional] action could be effective.

Thus, both before and after the change in the appropriation mechanism, the Western Shoshones' "true appeal is to legislative grace" (*ibid.*).[25]

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[25] Respondents' attempt (Br. in Opp. 8-9) to find a reading of the Court of Claims' opinion in *Temoak Band of Western Shoshones* that supports their position is unavailing. Contrary to respondents' suggestion, the Court of Claims' statement that, because of the amendment to the standing appropriation Act, "Congress can no longer stop the payment and defer the extinguishment of the title claim, just by not appropriating" (593 F.2d at 999), plainly does not mean that the court believed that the same result could be achieved by blocking establishment of a distribution plan. Rather, the court explained "it looks as if the Temoaks would have to get Congress to act *affirmatively*" (*ibid.* (emphasis added))—*i.e.*, to enact legislation to avert preclusion or addressing their land claim. Respondents' reading of the Court of Claims' comment is untenable, in light of the court's description of the congressional relief that remained open to the Shoshones as transpiring "after payment" (593 F.2d at 999).

Respondents also misread (Br. in Opp. 8) the Court of Claims' earlier opinion in *Western Shoshone Legal Defense & Education Ass'n.* The Court of Claims assuredly did not state, as respondents claim, that the extinguishment issue "never arose" in the claims litigation. (The language quoted by respondents, out of context, is from a description of the government's litigation position, which had been *rejected* by the Commission, "that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose" (531 F.2d at 500).) Nor did the Court of Claims state that the extinguishment issue was an "open one which could be decided either way." Compare Br. in Opp. 8. What the court in fact said was that the question whether it was in the Western Shoshones' interest to argue for or against extinguishment was "[a]t best from the[] [dissidents'] viewpoint * * * an open one that could be decided either way" (531 F.2d at 503). On the extinguishment issue itself the Court of Claims' true view is unmistakable (531 F.2d at 500): "The Commission made its own determination that the Shoshone lands were held by separate Shoshone entities and that Indian title to the area in question was extinguished by encroachment."

Because that avenue always remains open, see *Sioux Nation*, 448 U.S. at 390-407, it is particularly inappropriate for a court to blunt the intended effect of Section 22(a) simply because it thinks the results of litigation on the title issue would be enlightening to Congress or believes that enactment of relief legislation would be desirable. Cf. *Block* v. *North Dakota ex rel. Board of University & School Lands*, No. 81-2337 (May 2, 1983), slip op. 18-19. The rendering of advice to Congress about possible future legislative action is not within the authority of the federal courts. See *Muskrat* v. *United States*, 219 U.S. 346 (1911). The courts are not empowered to "consider the merits of a claim which Congress has not authorized respondents to raise." *California* v. *Sierra Club*, 451 U.S. 287, 298 (1981).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner

v.

MARY DANN AND CARRIE DANN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE INDIAN LAW RESOURCE CENTER IN SUPPORT OF AFFIRMANCE

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1476

UNITED STATES OF AMERICA,
Petitioner

v.

MARY DANN AND CARRIE DANN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE INDIAN LAW RESOURCE CENTER

INTEREST OF *AMICUS CURIAE*

The Indian Law Resource Center is a non-profit charitable and educational organization. The Center provides legal assistance and representation to Indian people and Indian governments from various parts of the United States in a broad range of matters. Through its legal and educational work, the Center seeks to protect the rights of Indians, including the basic right to land. The Center attorneys regularly work and consult with many Indian leaders and Indian rights attorneys who share the Center's interest in advocating full protection for Indian

interests under the Constitution and laws of the United States.

As required by Rule 42(2), the Center's *amicus curiae* brief is accompanied by written consent of all parties to the case and is presented within the time allowed for the filing of the brief of respondents.

STATEMENT

In this action, the United States government asks the United States courts to declare that two Western Shoshone women, the respondent Dann sisters (hereinafter "the Danns"), are trespassers on lands where they, their parents, their grandparents and their Western Shoshone ancestors from time immemorial have lived and worked. The Danns, members of an extended family which is also known as the Dann Band of the Western Shoshone Indians, use the lands principally for the grazing of their livestock. Over the years they have constructed fences and made other improvements.

Non-Indians have never possessed these lands. The Dann Band's possession of the lands has never been disturbed. No private individual or organization from the non-Indian community has ever asserted a claim of title to these lands. Typically, these original Indian title lands are not recorded.[1]

The Bureau of Land Management (BLM), an arm of the United States Department of the Interior, asserts

[1] Original Indian title is also known as aboriginal title or as Indian title. Since the time of Chief Justice John Marshall, original Indian title has been considered "as sacred as the fee-simple of the whites." *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835). The land rights of Indians are today entitled to full constitutional protection. *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980); N. Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations," 132 U.Pa.L.Rev. 195 (1984).

that these are federal lands which the BLM has exclusive authority to control and manage pursuant to federal regulation. The BLM first asserted its claim against the Danns in 1974 when it demanded that they stop grazing their livestock on the lands. The Danns refused, saying that the lands were their lands and not federal lands, that title is held by them through the Dann Band of the Western Shoshones. The BLM challenged the Danns' ownership and possession by issuing a grazing permit for these same lands to a non-Indian rancher named Tom Fromm. Mr. Fromm had no claim of title to the lands. He was simply a putative lessee or permittee under his agreement with the BLM.

This action was originally brought by the United States government on behalf of Mr. Fromm to eject the Danns and their livestock from the lands at issue so that Mr. Fromm and his livestock could use them instead.[2] The government also asked the court to award monetary damages against the Danns for "past grazing trespasses."

The Danns' defense rests on their assertion of present title. Their asserted interest arises from original Indian title and from the Treaty of Ruby Valley. The government conceded that the Western Shoshones held original Indian title to these lands until the middle of the 19th Century,[3] but claimed that such title had subsequently been acquired by the United States.

Unable to show federal title to the lands at issue, the government sought to defeat the Danns' defense by asserting that the courts are barred from entertaining it. This bar to judicial consideration is said to arise from a link between the Danns' legal defense and an Indian Claims Commission case which was brought in the name

[2] *United States* v. *Dann*, 706 F.2d 919, 931 (9th Cir. 1983); *United States* v. *Dann*, Civil No. R-74-60 BRT (D. Nev. Memorandum Decision and Order, Jan. 4, 1976) at 1-2.

[3] *United States* v. *Dann*, 706 F.2d 919, 933 (9th Cir. 1983) at n.10.

of the Western Shoshones. According to the government's argument, decisions made in the course of the Indian Claims Commission proceedings, or payment of the Indian Claims Commission's award, have triggered a discharge of the United States and a permanent statutory bar against judicial consideration of the Dann sisters' assertion of present title to the lands at issue.

The Court of Appeals ruled that the original Indian title to the Danns' lands has not been extinguished. The government failed to meet its burden of showing that the Indian title had been lawfully extinguished by clear and unambiguous congressional action. Neither the grazing permit scheme admistered by the BLM nor any of the other governmental or private encroachments on Western Shoshone lands has met the established legal standard for extinguishment of original Indian title. None of those encroachments has in fact or in law deprived the Danns of their grazing lands.

The court below also held that no bar to judicial consideration has arisen because, according to Section 22(a) of the Indian Claims Commission Act,[4] such bar would be imposed, if at all, only upon payment of the award, and no such payment has been made. If this Court reverses and applies the bar as urged by the government, that decision would permit the BLM to lease the lands to whomever it pleases, would allow the government to eject the Danns at its whim, and would virtually mandate that the district court award the government trespass damages.

[4] Indian Claims Commission Act, ch. 959, 60 Stat. 1055, 25 U.S.C. (1976 ed.) § 70u.

ARGUMENT

The Indian Claims Commission Act Does Not Authorize The Taking Of Indian Lands Or The Extinguishment Of Indian Land Titles.

Although the government relies principally on the discharge provision of Section 22(a) of the Indian Claims Commission Act, it uses the entire Act as a backdrop for its argument in support of the BLM's efforts to eject the Danns. The government suggests that the Act was created by Congress for the purpose of taking Indian lands and for extinguishing Indian land titles. According to this argument, the participants in the Indian Claims Commission process—the Indian claimants, the claims attorneys, the government, the Indian Claims Commission, and the Court of Claims—have been authorized by the Act to make arguments, concessions, stipulations, rulings and/or payments which result in the taking of Indian lands today.[5]

Viewed charitably, the government's argument suggests that Congress authorized Indian claimants in Indian Claims Commission proceedings to stipulate away or to cede the present land rights of some or all of the Indians whose interests were obstensibly being represented by those claimants. Viewed less charitably, the government's argument suggests that Congress took sides against Indians by creating a money-for-land trade-off scheme whereby the government could, through its defense of cases in the Indian Claims Commission, help foster rulings which would permit a very low cost[6] expansion of federal

[5] There is no suggestion by the government that the Act would result in comparable adverse consequences against land titles held by non-Indians. For example, a ruling by the Commission that Indian title to certain lands had not been lawfully extinguished would not, apparently, authorize Indians to eject the government or any non-Indians who might be in possession of those lands.

[6] The Danns' grazing lands were valued in the Indian Claims Commission proceedings at their 1872 market value, without interest, a small fraction of their present value.

land holdings at the expense of Indians such as the Danns. From either point of view, the payment of the Commission's money award is seen as the final, conclusive step in a congressional scheme to transfer lands of Indians into the hands of the federal government and others.

There is nothing in the Act or its legislative history which indicates that Congress intended such a result. Rather, Congress intended to redress some of the past wrongs against Indians by providing monetary relief to those Indians who elected to make claims in the Indian Claims Commission.[7] Congress did not intend to impose anything on Indians, and it did not intend to take anything from Indians. One must stand the Act on its head to suggest that it authorizes or justifies adverse action against present Indian land rights.

Neither is there any indication that Congress' inclusion of the discharge provision of Section 22 was intended to have any effect, positive or negative, on Indian land rights. Section 22 is simply boilerplate discharge and bar language which has long been used in statutes authorizing monetary claims against the United States. *See, e.g.*, 28 U.S.C. §§ 285, 286; Act of Mar. 3, 1863, ch. 92. § 7, 12 Stat. 766. As with similar statutory discharge and bar provisions, Congress intended that Section 22 would prohibit repeated litigation of the same or related claims for monetary damages against the government. But that salutary objective is no authority for the extinguishment of Indian land rights.

Even if some evidence of congressional intent to extinguish Indian land rights could arguably be implied, neither Section 22(a), the Act as a whole, nor any other related congressional enactment satisfies the settled test for extinguishment of Indian title. Extinguishment of

[7] For a succinct history of the Act, see F. Cohen, *Handbook of Federal Indian Law*, 160-162 (1982 ed.).

Indian land rights by Congress must be by "plain and unambiguous action." *United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339, 346 (1941). There is certainly no clear and unambiguous evidence that Congress intended that the Act could be used by the government to deprive the Danns, the Dann Band, the Western Shoshones, or Indians in general of any rights to land.

The Act has always been construed to deny any possible effect on land title. Soon after the Act went into effect, the Indian Claims Commission made clear that it was not empowered to grant equitable relief to Indians or entertain quiet title actions. *The Osage Nation of Indians* v. *United States*, 1 Ind. Cl. Comm. 54, 65-66 (1948), *rev'd on other grounds*, 119 Ct. Cl. 592, *cert. denied*, 342 U.S. 896 (1951). ("The Indian Claims Commission Act does not specifically state the character of relief the Commission may grant, but this lack of specificity is not vital, for its provisions plainly limit the relief to that which is compensable in money. . . . No other kind of relief is provided in the act.") At all times, monetary damages have been the only remedy available to Indian claimants under the Act. During the existence of the Indian Claims Commission, the government's attorneys, the attorneys prosecuting the claims, the Indian Claims Commission, the courts, the Interior Department and the Bureau of Indian Affairs repeatedly informed Indians and non-Indians alike that the Indian Claims Commission, because of its strictly limited powers, posed no threat to existing land titles. *See, e.g., Billie* v. *United States*, 146 F.Supp. 459, 461 (Ct. Cl. 1956), *cert. denied*, 355 U.S. 843 (1957). ("If appellant's title to the land which is the subject matter of the suit is indeed paramount, its paramount title will not be affected by the decree of the [Indian Claims] Commission as to the rights of the original parties since it will not purport to adjudicate appellant's title or right to the land in question.") *Osceola* v. *Kuykendall*, 4 Ind. L. Rep. F-80 (D.D.C. 1977). ("[P]laintiff's right of pos-

session and occupancy will not be affected by the judgment [of the Indian Claims Commission.]")

Indians were told that the Indian Claims Commission could neither restore to the Indians any lands which had allegedly been unlawfully taken from them, nor extinguish land title belonging to Indians today. And non-Indians were assured that the Indian Claims Commission was without legal authority to render any decisions adverse to their land titles.

In sum, the government's support of the BLM's effort to eject the Danns through reliance on the Act or on particular developments in an Indian Claims Commission case is completely misguided. That effort perverts the fundamental remedial purpose of the Act by creating new Indian grievances rather than resolving old ones, and it conflicts with the settled law concerning the Commission's limited powers as a quasi-judicial body.[8]

The Danns' Legal Defense Of Present Title Is Not Barred, Because The Danns Are Not, Within The Meaning Of Section 22, A "Claimant" Making "Claims And Demands" Touching Upon The "Controversy" Which Was Considered By The Indian Claims Commission.

Assuming for the sake of argument that decisions of the Indian Claims Commission or payment of the Commission's award could result in adverse consequences to present Indian land title, the question remains whether the statutory bar on which the government relies is applicable to the defense of present legal title which the Danns have asserted in the present ejectment action. Under Section 22(a), payment of the award in the Indian Claims Commission case would prohibit a "claimant" from relitigating "claims or demands touching any

[8] The district court correctly described the Indian Claims Commission as "an administrative tribunal." *United States* v. *Dann*, Civil No. R-74-60 BRT (D. Nev. Memorandum Decision and Order, Jan. 4, 1976) at 4.

of the matters involved in the controversy" which the Commission had decided, but it clearly would not bar non-claimant Western Shoshone Indians from asserting their claims, demands and legal rights which do not touch upon that particular legal controversy.

The Danns were never "claimants" in the Indian Claims Commission case. Neither the Danns, the Dann Band, nor any Western Shoshone governmental entity with arguable legal rights to do so, has ever made a claim for monetary compensation for the taking of their grazing lands. The Danns have in fact always vigorously opposed the Indian Claims Commission case because of their fears that it might put their Western Shoshone land rights in jeopardy.[9]

Working in concert with other Western Shoshones the Danns repeatedly notified the Indian Claims Commission, the Court of Claims and the government that the claimants in the Indian Claims Commission case did not represent their interests and that their interests included present title to the lands at issue.[10] The Danns clarified their position to all parties concerned many years before the asserted "payment" of the award was made by the government.

[9] Their fears have been realized in the actions of the BLM and in the position which the government urges in this action.

[10] The Court of Appeals found: "In 1974, a group of Western Shoshone, including the Danns, attempted to intervene in the ICC proceedings to remove from the claim certain lands, including those that are the subject of the present trespass action." *United States* v. *Dann*, 706 F.2d 919, 922 (9th Cir. 1983).

The government acknowledges that the Danns were associated with the Western Shoshone Legal Defense and Education Association which made that intervention attempt. Brief for the United States, p. 8. The record shows that the Danns' efforts to protect their land rights against the threat of extinguishment long predate the 1974 intervention attempt. The Danns were never, however, formal parties in any Indian Claims Commission or Court of Claims proceedings.

The matters involved in the "controversy" which some Western Shoshone claimants presented to the Indian Claims Commission are entirely unrelated to the Danns' assertion of present title. The controversy before the Indian Claims Commission was solely about the question of whether the government should be held liable in damages for the uncompensated extinguishment of Western Shoshone land rights. The case never involved a dispute over the issue whether extinguishment actually occurred in fact or in law. The parties in the case stipulated that this extinguishment had occurred over a hundred years ago. The controversy before the Indian Claims Commission did not even touch upon the asserted present legal right of the Danns to the lands which are at issue in the present action.

Moreover, it would distort the plain meaning of the phrase "claims or demands" to apply it to the Danns' legal defense in this action. The Danns are making no claim or demand against the government. Rather, it is the government which is making a claim or demand against them. For untold generations the Dann Band and the Western Shoshone people have been in possession of lands to which the government is now making a claim. Having agreed to pay for the title to Indian lands which it has perhaps not lawfully acquired, the government now claims the right to eject as trespassers Indians who live and work on some of those lands and who never made any claim for such payment.

The Indian Claims Commission Case May Not Be Used As Support For A Present Taking Of The Disputed Grazing Lands Of The Danns—Whether Or Not Payment Of The Award Is Made—Because The Danns Did Not Have An Opportunity To Be Heard In That Case On Their Asserted Legal Right To Those Lands.

The property right asserted by the Danns in this action, whether founded on treaty or on original Indian title, is "as sacred as the fee-simple of the whites." *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746

(1835). The Danns are entitled to a prior hearing in a court of competent jurisdiction before they may be deprived of their asserted right to maintain their title and their possession of the lands at issue.[11]

The government does not apparently argue that the Danns' interest in the lands could be summarily taken without prior judicial hearing. Instead, the government takes the position that the Indian Claims Commission case satisfied the hearing requirement. If the Danns were denied a fair opportunity to be heard in the case before the Commission, there would be no ground for using any aspect of that case, including its final judgment and award, against the Danns in the present action.

The record shows that the Danns were never given an opportunity to be heard in the Indian Claims Commission case and that their interests were never adequately represented by those Western Shoshones who did appear as claimants. The government does not dispute the fact that the Danns themselves did not appear as claimants. Rather, the government argues that the claimants had lawful authority to represent the Danns' interest in the lands at issue. The questions of whether the claimants in the Indian Claims Commission case had authority to represent the Danns and, if so, whether such representation was adequate, raise both statutory and constitutional issues.

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[11] In its motion to this Court, the amicus American Land Title Association expresses its concern for "certainty and predictability of the laws affecting titles to and rights in real estate" and its solicitude for the "legitimate expectations of current landholders, who acquired their land in good faith." The only private landholders facing such uncertainty and unpredictability in this action are the Danns. One must therefore question whether the Association has the same respect for the land titles of Indians that it unquestionably has for the land titles of non-Indians. The constitutional right of Indians to protect their land rights may not be denigrated by a double standard.

Under the Indian Claims Commission Act, Congress established a unique method whereby monetary claims against the United States could be brought as group claims. An "identifiable group" of Indians was permitted to represent the interests of a particular Indian tribe or entity. 25 U.S.C. (1976 ed.) § 70a. The concept of an "identifiable group" as claimant or petitioner was devised by Congress to facilitate Indian claims against the government by those Indian peoples who were not clearly organized under recognized governments of particular Indian tribes or bands. Through most of the course of the Western Shoshone Indian Claims Commission case, the petitioner was an "identifiable group" denominated as the Western Shoshone Identifiable Group.

The Western Shoshone Identifiable Group was a unique legal entity, a legal fiction, created solely for the purpose of presenting the money claim against the United States.[12] It had no governmental authority to take any action on behalf of the Danns with respect to their asserted interest in the lands at issue. The various Shoshone individuals who acted as spokesmen for the Western Shoshone Identifiable Group and who dealt directly with the claims attorneys were not Western Shoshone governmental officials with governmental authority over the Danns. Neither the Western Shoshone Identifiable Group nor any of its spokesmen had any legal right or authority to control, manage or dispose of *any* Western Shoshone lands.

For a period of a few years in the latter stages of the Indian Claims Commission case, the Temoak Bands, one

[12] The actual Western Shoshone parties or beneficiaries of the award have not yet been determined and will only be determined in the final, congressionally supervised "use and distribution" stage of the claims process. 25 U.S.C. § 1401 *et seq.* That stage occurs only after the judgment is certified and after Congress decides to whom and under what conditions payment should be made from the standing appropriation.

of the distinct, recognized governmental entities of the Western Shoshones, was authorized by the Commission and the Court of Claims to maintain the damages claim as the representative claimant for the entire Western Shoshone group. However, the Danns and the Dann Band are not part of the Temoak Bands. The Temoak Bands has no governmental authority over the Danns or the lands at issue, and it too was not authorized by the Danns to represent them or to take any legal action with respect to their asserted interest in the lands.

The Court of Claims initially ruled that the Temoak Bands had "the privilege of exclusive representation" of the Western Shoshone group in the Indian Claims Commission proceedings. It denied a request for a hearing on the question of whether the Temoak Bands is a proper representative of the identifiable group. *Western Shoshone Legal Defense and Education Association* v. *The United States and the Western Shoshone Identifiable Group, Represented By The Temoak Bands of Western Shoshone Indians*, 531 F.2d 495, *cert. denied*, 429 U.S. 885 (1976).

Three years later this ruling was reversed after the Temoak Bands joined with the Danns and other Western Shoshones in an effort to amend the money claim in order to prevent any threat of extinguishment of present Western Shoshone land title. *The Temoak Band of Western Shoshone Indians* v. *The United States and the Western Shoshone Identifiable Group Represented by the Temoak Bands of Western Shoshone Indians*, 593 F.2d 994, *cert. denied*, 444 U.S. 973 (1979). As the highly unusual caption of this 1979 case indicates, the representative claimant, the Temoak Bands, appeared to bring suit against itself. It took this exceptional legal step in order to control the case and to prevent the damages claim of the Western Shoshone Identifiable Group from possibly doing harm to Western Shoshone land rights. That effort failed, and the Temoak Bands were

dropped from the caption of the Indian Claims Commission case and no longer treated as a representative of the Western Shoshone Identifiable Group.

Thereafter, the Western Shoshone Identifiable Group was the only named claimant representative in the Indian Claims Commission case. It has remained unclear from that time forward exactly which individuals and organizations among the Western Shoshones were actually in charge of the case and responsible for giving instructions to the claims attorneys. The confusion and discord which developed as to this and related issues are revealed in the final legal proceedings in the case, the proceedings concerning the award of attorneys' fees. *Western Shoshone Identifiable Group* v. *United States*, 652 F.2d 41 (Ct. Cl. 1981).

It is clear, however, that the persons who prosecuted the damages claim to its conclusion had no governmental authority over the Danns or their lands. They had no legal authority as individuals or as a corporate entity to act on the Danns' behalf in any legal proceedings concerning their present asserted land rights. The "identifiable group" could make no claim that it was an adequate representative acting on behalf of the Danns in a governmental capacity.

The named claimant representative in the Indian Claims Commission case was likewise not an adequate representative of the Danns in the class action sense of the term. The Court of Claims correctly made note of the fact that the case had not been certified or treated as a formal class action under Rule 23 of the Federal Rules of Civil Procedure. *Western Shoshone Legal Defense and Education Ass'n.* v. *United States*, 531 F.2d 495, 504 (1976).[13] Nevertheless, the government now asserts that

[13] In the same case the court incorrectly assumed that those Western Shoshones who opposed aspects of the damages claim case could, as members of the claimant representative Temoak Bands, obtain redress "through the internal mechanism of the organized

the adverse actions taken by the claimant representative are binding on the Danns, as members of the Western Shoshone Identifiable Group, just as though they were actions taken by certified class action representatives. Whether or not the complete Rule 23 analysis should be applied, the Court must inquire whether representation was constitutionally adequate in these circumstances. Due process requires adequate representation of interests as a condition to according binding effect to a judgment against purported members of a class. *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

That due process requirement was not satisfied in the Indian Claims Commission case. The record shows that the claimant representative and the claims attorneys not only failed to represent and protect the Danns' land interests, but also that they actively opposed them. The Danns and other Western Shoshone individuals and organizations sought to intervene and protect their interests, but the claimant representative and the claims attorneys successfully opposed their efforts.[14] The Danns were not permitted to intervene or to opt out of proceedings, yet those proceedings are now being described by the government as their last opportunity to present their legal defense against ejectment from property which is assertedly theirs.

One of the most clear demonstrations of the disregard for adequate representation in those proceedings is found in the brief in opposition to certiorari which the claims attorney filed on behalf of the Western Shoshone Identifiable Group in *Western Shoshone Legal Defense and Education Ass'n.* v. *United States*, No. 76-90 (October

entity." This assumption was contradicted by allegations that those in opposition were not members of the claimant representative and were not eligible to join. *Western Shoshone Legal Defense and Education Ass'n.* v. *United States*, 531 F.2d at 504, n.17.

[14] See n.10, *supra*.

Term, 1976), *cert. denied*, 429 U.S. 885 (1976). In that brief the claims attorneys state that there is "no doubt" that Indian title to the lands here at issue has been extinguished. The settled rule that Indian title may lawfully be extinguished only by formal act of Congress is labeled a "novel theory." *Id.* at 8, n.14. This shows that the claimant representative and its attorneys were not willing to present to the courts the straightforward legal argument on which the Danns prevailed below in both the District Court and Court of Appeals. In their pursuit of monetary damages, which could be maximized by establishing the most extensive extinguishment of Indian title, the claimant representative took a stance in the case which was overtly hostile to, rather than fairly representative of, the Danns' interests. The claims attorneys, whose 10% contingency fees would be augmented in direct proportion to the amount of Indian title which the Commission would find extinguished, had no arguable attorney-client relationship with the Danns. In sum, the Danns were precluded from fair representation of their interests in the Indian Claims Commission case. They were given their first opportunity to be heard only as defendants in the present trespass action.

As the government notes in its brief, the jurisdiction of the Indian Claims Commission did embrace categories of claims which were unique to Indian claimants.[15] Through statutory devices such as the "identifiable group", Congress manifestly intended to create a liberal legislative scheme which would offer an unusually wide range of relief to Indian claimants. This generous intent does not, however, show any intent to deny adequate representation to Indian interests such as those asserted by the Danns. In any event, Congress could not constitutionally deny the Danns or other Indians their due process right to adequate representation.

[15] Only "some" of these claims cases were "relatively conventional." Brief for the United States at 4-5.

The Western Shoshone damages claim was not a typical Indian Claims Commission case involving gratuitous supplementary benefits for Indian claimants whose ancestors had, for example, received unconscionably inadequate consideration for lands they undeniably ceded to the United States. To the contrary, this was a case involving potential monetary benefits for some Western Shoshones and potential serious harm to the property rights of the Danns and others who may be similarly situated. In these exceptional circumstances the constitutional test of adequate representation must be strictly applied to disallow any bar resulting from the Indian Claims Commission case and to uphold the Danns' right to a full hearing on their defense of present title in this trespass action.

Payment Of The Indian Claims Commission Award Has Not Been Made.

As argued above, payment, the final step in the Indian Claims Commission process, should have no bearing whatever on the Danns' right to be accorded full judicial consideration of their legal defense of present title in this trespass action. The Danns were not parties in the Indian Claims Commission case, were not adequately represented in that case, and have never asked for or agreed to be paid any of the award rendered in that case.

However, if, as a result of that case, there arguably is a discharge of the United States which would bar judicial consideration of the Danns' asserted legal interest, such a bar and the resultant ejectment and trespass damages could not occur until after "payment" has been made within the meaning of Section 22(a) of the Act.

The usual definition of payment includes the element of acceptance.[16] Tender alone is not sufficient to consti-

[16] Black's Law Dictionary, 1285, 1286 (4th ed. 1957). For example, the execution and delivery of negotiable papers is not payment unless it is accepted by the parties in that sense.

tute payment if acceptance does not follow. The government argues that payment has occurred because the government has tendered the Commission's award to the Western Shoshones. The government has deposited the award in a government-controlled trust account in the name of the Western Shoshones, but not a single Western Shoshone governmental entity has agreed to accept it, and there is widespread Western Shoshone opposition to the government's efforts to convince the Western Shoshones to accept it.[17]

There is absolutely no Western Shoshone control over the use or distribution of the money, and Congress has not yet even begun to implement the required statutory process whereby it will determine who among the Western Shoshones might be lawful beneficiaries and under what conditions the money may be used and distributed. 25 U.S.C. § 1401 *et seq.*

Common sense and the plain meaning of the term payment requires that the money at least be in the control of the Indians before they are deemed to have been paid. The government is straining to stretch the meaning of payment to cover these particular and perhaps unique circumstances and thereby foreclose judicial relief to the Danns. That effort would be better directed towards assuring that payment, if and when it does occur, will be pursuant to a legislative enactment which will protect the property interests of the Danns and others similarly situated.

CONCLUSION

The decision of the Court of Appeals should be affirmed and the action should be remanded for further hearings consistent with that court's order. In the alternative, this Court should remand for further hearings on questions

[17] In general, Western Shoshones oppose payment of the award because of its potential harm to the land rights of the Danns and others similarly situated. All of the Western Shoshone governmental bodies have gone on record against payment.

which were presented but not decided below,[18] including the questions of whether there was "privity" between the Danns and the claimants in the Indian Claims Commission case and whether the Danns' defense to the present trespass action is a "claim" which the federal courts are now barred from considering.

Respectfully submitted,

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[18] *United States* v. *Dann*, 706 F.2d 919, 924, n.3, 925, n.4 (9th Cir. 1983).

RESPONDENT'S

BRIEF

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October Term, 1984

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On a Writ of Certiorari
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No. 83-1476

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

UNITED STATES OF AMERICA,
Petitioners/Plaintiff,
vs.
MARY DANN and CARRIE DANN,
Respondents/Defendants.

BRIEF FOR RESPONDENTS

STATEMENT

The Respondents, Mary and Carrie Dann, are individual members of a totally self-sufficient and autonomous band of Western Shoshone Indians, one of many constituent bands comprising the Western Shoshone Nation. The undisputed evidence in the district court below was that the Dann sisters and other members of the Dann Band and their predecessors have openly and notoriously, under an assertion of Western Shoshone title and treaty right, used and occupied the subject lands since time immemorial.[1] Such possession was undisturbed and unchallenged until 1974, when the United States Government instituted this action for trespass damages and an

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[1] Exhibit 1-D; see also 14-D, pp. 3-6, 13; Exhibit 8-D, pp. 30-31. All the Exhibits can (D1-15) were submitted under para. 7, Pre-trial Order, (R-39, 42). At the Pre-trial Conference, Sept. 8, 1978, the district court ruled that all those exhibits were in evidence. (T-27).

injunction to eject the Danns. The Dann Band is in similar possession of other lands, not specified in the complaint here but apparently within the scope of the injunction obtained in the district court, Pet. App. 31a, some of which are fenced, irrigated and improved with structures, including the Band's bathing, laundry and geothermal energy facilities.

Both Dann sisters were born on the subject lands more than a half-century ago and have derived their living, beginning in their childhood, by using these lands and similar, adjacent lands on a daily basis for raising stock. Their parents and grandmother also herded stock on the same lands beginning in the nineteenth century and *their* ancestors used and occupied these lands continuously for hundreds of years. The Dann sisters' father homesteaded the Band's base camp when the rights and privileges of citizenship were extended to Indians in 1924, and Mary and Carrie and other members of the extended family which constitutes the Band now live in homes built on this patented homestead.[2] The homestead title is not directly involved here; it has little economic value except to provide a base and a secure water source for the stock business. The Danns' "desert stock operation" utilizes the open range year round.[3] The Danns also

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[2] The Dann Band numbers approximately thirty members of which half live on or near the base camp at any given time.

[3] Because of the wide dispersal of the stock such an operation is labor intensive. The lack of extensive hay fields, and pasture lands on the homestead and the high cost and general unavailability of grazing permits makes conformance with Bureau of Land Management regulations economically impractical. The Government claimed, in opposition to the stay order, that the Danns "used" over $16,000 worth of grazing permits per year. If the district court's order had not been stayed, the Danns would have been compelled to sell their herds.

use the subject lands for gathering firewood, building materials, pine-nuts, and plants and herbs for food and medicine. The Danns' holding pasture and some outbuildings are located on lands now claimed by the Government.

The Danns have always considered the lands they have used and occupied to be the property of the Western Shoshone people as a whole, subject to the local jurisdiction of the Dann Band. The stock grazed on the land, however, is the property of individual members, in this case, Mary and Carrie Dann as partners.

The continuing presence of Western Shoshone Indians on the open range in their traditional areas was recorded in the early proceedings before the Indian Claims Commission.[4]

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[4] *See*, Stewart, *The Western Shoshone of Nevada and the U. S. Government*, Exhibit 14-D (Plaintiff's Exhibit 1, Offset Phase, I.C.C. Docket 326-K), and testimony of O. C. Stewart, Anthropological expert, before Indian Claims Commission, Sept. 27, 1973, Transcript, pp. 430-31, Exhibit 10-D:

> [Article VI of the Treaty of Ruby Valley] seems to hint at a cultural fact of Western Shoshone life which has persisted from 1863 to 1973. Strong and often repeated attempts to wean Western Shoshone away from their emotional attachment to their own natal valleys have failed.
>
> For most citizens of the United States, it is difficult to comprehend why Western Shoshone Indian families will remain in some of their poorer ancestral locations, barely surviving on a near starvation diet, with inadequate housing and clothing, on arid plots of land difficult to reach because they are many miles away from improved roads.
>
> The best efforts of federal, state and county authorities have failed to tempt the Western Shoshone to abandon their ancestral areas. The Western Shoshone are in 1973

(Continued on next page)

The Western Shoshone have not challenged any private titles within their territory and have taken care to not cast any shadow on such titles.[5] The Government's May 5, 1974 complaint claimed that the subject lands, eight specified sections, were public domain lands of the United States and that the Danns were in violation of the Taylor Grazing Act by grazing their stock thereon. The Danns answered, admitting their use of the lands but denying that the lands were public domain subject to the Taylor Grazing Act and affirmatively asserting that aboriginal and treaty title to the lands was in the Danns and the Western Shoshones. The Danns have also, consistently asserted, in the alternative, that they have individual aboriginal use and occupancy rights under the doctrine of *Cramer v. United States,* 216 U.S. 219 (1923). *E.g.,* Answer Para. 2; Response to Supplemental Memorandum (Sept. 11, 1979).

The Government has never contested the continuous use and occupancy of the subject lands by the Danns nor

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as they were in 1863 dispersed in nearly all sections of the four large Nevada counties, Elko, White Pine, Eureka, and Lander, enclosed in the Western Shoshone territory described in the [Treaty of Ruby Valley] and in Nye County. As the better land was acquired by whites for mining and ranching the Shoshone remained and adjusted as best they could. Stewart, *op. cit., supra,* at pp. 3-4. [Bracketed material added.]

[5] The fears expressed by the wound-be *Amicus Curiae,* the American Land Title Association are completely unfounded. The only private interests affected are those of users of putative federal lands in the area. Those *local* interests have been kept well informed of the Western Shoshone position and are reacting in a calm, constructive manner in an effort to solve problems cooperatively with the Western Shoshone National Council. See, *Recommendation* #84-1, Nevada State Multiple Use Advisory Committee on Federal Lands. (App. U).

contended that it or any third party has ever attempted or gained actual physical control of the subject lands.[6]

The case was initially submitted to the district court on cross motions for summary judgment on September 19, 1975, there being no facts in dispute following discovery and the submission of affidavits and numerous historical exhibits by the Danns. (R-13, 18-20 T-66). After taking the matter under advisement for nearly a year and a half, the district court granted summary judgment for damages and issued an injunction forbidding any further grazing use of the lands by the Danns without obtaining grazing permits. The district court held on February 22, 1977 that the Danns were collaterally estopped from asserting superior title by an interlocutory decision in *Shoshone Tribe v. United States,* 11 Ind. Cl. Comm. 387, 416 (1962), that "the United States, without payment of compensation, acquired, controlled or treated [Western Shoshone] lands as if they were public lands."

The district court's judgment was reversed by the court of appeals, following an expedited hearing, and remanded for a decision on the merits of the issue of whether aboriginal title had ever actually been extinguished. *United States v. Dann* [*Dann I*], 572 F.2d 222 (9th Cir. 1978). The court of appeals held that the Danns

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[6] At most the Government showed that the Bureau of Land Management issued grazing permits to third parties in the general area. If those permits were ever actually used and third party stock entered the Danns' lands, such event would hardly constitute a complete, permanent taking of the subject lands. Nevada is an open-range state and the entry of alien stock onto private lands does not constitute an actionable trespass, Nev. Rev.Stats. 569.450, and is commonplace and often unnoticed.

were not collaterally estopped from asserting unextinguished Indian title on two independent grounds. First, the decision of the Indian Claims Commission was not a final judgment within the meaning of the Indian Claims Commission Act. Second, the title issue (that is, whether the Indians' title had been extinguished) was neither actually litigated nor actually decided in the proceedings before the Commission.[7]

The court of appeals order of March 15, 1978 stated that the case was remanded "to the District Court for the purpose of deciding title". *Id.* at 223. On May 5, 1978, the defendants moved the district court for an immediate ruling on the same grounds asserted in obtaining the expedited appeal in the court of appeals, and for the reason that the issue of title had previously been fully submitted by the parties. That motion was denied and the matter was postponed from time to time over the defendants' objections, on the court's own motion or upon motion of the Government. (R-41, R-58).[8]

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[7] The district court had the entire record from the I.C.C. before it, Exhibits D-9-10, and the Government never disputed the Danns' contention that the evidence and arguments in the Commission failed to address the extinguishment issue.

[8] On September 8, 1978, the Danns moved in open court for a speedy trial on the issue mandated by the court of appeals. Counsel for the Government suggested that the district court hold the instant case "in suspension" pending the decision of the Court of Claims in the *Temoak Bands* claims appeal. (T-28) Counsel for the Danns objected to the Government's strategy of keeping the title from being decided until it could be foreclosed. The court replied:

> As far as having this case decided by the Indian Claims Commission and the Court of [Claims], and perhaps by the Supreme Court, through that route, I am very sympathetic with the Government's position on that.

(T-31) The decision on this case was delayed another nineteen months apparently in order to await the preclusive effect of the Indian Claims Commission award.

The matter was finally resubmitted on July 3, 1979, on the original cross motions for summary judgment, that is, in exactly the same posture as prior to the first appeal. (T-26, 32-84.) In fact, the same arguments were made and the same evidence relied upon in the July, 1979 hearing as in the original argument, four years previously, and in the court of appeals. While the matter was under advisement, the Government from time to time filed supplemental memoranda updating the district court on the progress of the Indian Claims Commission case through the Court of Claims. (R-64-68.) The third such memorandum (R-69) gave notice that the Court of Claims had reported the final award of the Indian Claims Commission to the General Accounting Office, predicted that the award would be automatically paid, and argued that "the judgment of the Indian Claims Commission is now clearly final for purposes of res judicata and collateral estoppel."[9]

The district court's judgment of April 25, 1980 (Pet. App. 30a-31a), quoted the Government's argument and held that the Danns had unextinguished title to the lands in question until December 6, 1979. At that time the Clerk of the Court of Claims certified to the General Accounting Office that the award in the Western Shoshone land claims case was final. The district court held that the 1979 certification of the award, which was based upon the purported extinguishment of the tribal title in 1872, was the actual date of extinguishment of Indian

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[9] This memorandum was not answered by defendants because they had previously responded, on numerous occasions, to the same argument on "collateral estoppel" (see, e.g., Response to Supplemental Memorandum, R-60), and were relying on the prior decision and mandate of the court of appeals.

title in the Dann case. Indian title having subsisted until 1979 despite the decision in the claims case, the district court dismissed the Government's claim for trespass damages but issued an injunction forbidding the Danns' use of the "public domain" without obtaining permits. (R-69.) (Pet. App. 31a). The injunction was stayed by the district court pending appeal "to maintain the status quo ante existing for many years".

The Government in its Third Supplemental Memorandum, and the district court in quoting the memorandum (Pet. App. 30a-31a), did not contend that payment had actually been made nor claim that the statutory discharge provision of the Indian Claims Commission Act [I.C.C.A.], Section 22(a), 25 U.S.C. (1976 ed.) 70 u(a) (Pet. 2) applied. Rather, the Government contended, and the district court accepted, that on December 6, 1979 the Clerk of the Court of Claims certified the final award for payment and "the judgment of the Indian Claims Commission is now clearly *final for purposes of res judicata and collateral estoppel.*" (Pet. App. 30a-31a) (emphasis added). The "final judgment" language of I.C.C.A. Section 22(a) (Pet. 2) is contained in a separate paragraph from the discharge language and is triggered by the Commission's final report. The discharge provision is triggered by "payment," which is clearly a separate event from a final judgment under the Act.

Because of the lack of evidence in the district court regarding whether and when payment had actually occurred,[10] the Danns filed a Motion for Remand to have

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[10] The pre-trial order of February 6, 1975, Para. 3(g), under which the cross motions for summary judgment had been

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an evidentiary hearing in the district court on the question of actual payment. In connection with the Motion for Remand, the parties filed memoranda with attached documentation in support of their contentions. The motion was denied without comment by the court of appeals which took into consideration, in the decision appealed here, the documents submitted by the parties for the first time on appeal.[11]

The course of the separate proceedings in the Indian Claims Commission and Court of Claims was long and tangled. The caption of the final decision in that case in the Court of Claims, *The Temoak Bands* (sic) *of Western Shoshone Indians, Nevada v. the United States and the Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Indians,* (sic) *Nevada,*[12] is indicative of what the court of appeals in *Dann I* described as "some difficult issues [which] are presented in deciding the identity of parties question in the context of tribal litigation before the [Indian Claims] Commission, 572 F.2d 222, 26, n.1 (9th Cir. 1979).

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submitted to the district court, stated as one of the "facts admitted by the parties and requiring no proof" that "No compensation has been paid by the United States to the Western Shoshone Indians for any right of use and occupancy in, or title to, the lands described in paragraph 5 of the complaint." (R-39-40).

[11] The Brief for the United States contends, (p. 15) that the Danns raised the payment issue "on appeal (for the first time in the litigation)." The government omits to mention that it never alleged actual payment of the award in the district court and did not do so until the Motion for Remand in the Court of Appeals.

[12] 593 F.2d 994 (Ct. Cl. 1979) *cert. denied* 444 U.S. 973.

The Indian Claims Commission case began in 1951 as a claim brought against the United States on behalf of a group of Shoshone identities and, in the alternative, jointly on behalf of the Shoshone Tribe, by various "representative plaintiffs" including the Temoak Bands of Western Shoshone Indians, Nevada for the taking of aboriginal Shoshone lands in six large Western states. *Shoshone Tribe of Wind River Reservation v. United States*, Finding 1, 11 Ind. Cl. Comm. 387-88 (1962). The Commission found that the Temoak Bands of Western Shoshone Indians, Nevada was organized under the Indian Reorganization Act and was "recognized by the Secretary of the Interior as having authority to maintain a suit" (*Id.*). The Commission made a general finding that: "The organized tribes or groups above named [including the Temoak Band] have the capacity to maintain this suit." (*Id.*)

The Indian Claims Commission did *not*, however, make any finding whatsoever that the Temoak Bands had the authority or was the proper party to exclusively represent the entire "Western Bands of Shoshone Indians" or, as the Commission found the land-owning entity to be, "the Western Shoshone identifiable group." Finding 15, 11 Ind. Cl. Comm. 387, 403. Despite the fact that the 1962 decision and supporting findings made it obvious that the Temoak Bands was only a small part of the entity, the Commission neglected to make an inquiry or any findings on the question of whether the Temoak Bands could or should represent the "identifiable group" by any stan-

dard, let alone one that would meet standards of due process set out in the argument, *infra*.[13]

Despite its repeated contention that the claim was a "tribal claim," the Government has not disputed that the Temoak Bands was only a small part of the land-owning or claim-owning entity, nor has it attempted to deny the Commission's finding that there was no "tribe" or political organization of the "Western Shoshone identifiable group" itself. *See, e.g., 11, Ind. Cls. Comm.* at 391, 402, 403, 438; Rusco, *The Organization of the Temoak Bands of Western Shoshone*, XXV NEVADA HIST. SOC. Q. 175 (Fall, 1982) (Copy lodged with Clerk).[14]

Years later the improper representation of the Western Shoshone identifiable group by the Temoak Bands was pointed out to the Court of Claims. In a decision that contradicted its own earlier authority on the subject, the

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[13] However, in its published Opinion, issued contemporaneously with the Findings, *supra*, the Commission concluded that the "Te-Moak Bands (sic) of Western Shoshone Indians, Nevada, has the right to maintain this action for and on behalf of the descendants of the Western Shoshone identifiable group." *Id.* at 446.

[14] The Rusco study traces the political history of the Western Shoshone and their efforts to organize to deal with the United States. Rusco uses government reports to document that middle level Bureau of Indian Affairs officials blocked the recognition of the Traditional Council under the Indian Reorganization Act in the 1930s, despite the efforts of agency field agents, because those officials erroneously believed the Western Shoshone had ceded their land by treaty. The recognition of the Temoak Bands, a small group living on the Elko Indian Colony, and the prosecution of the I.C.C. claim disrupted organization efforts into the 1970s. The Traditional Council, which evolved into the National Council and now includes the Temoak Bands, at all times opposed the claim and asserted treaty title.

Court of Claims upheld the exclusive representative status of the Temoak Bands and its absolute right to determine litigation strategy, with the following explanation:

> In *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 953-54, 203 Ct. Cl. 426, 256-59 (1974), we upheld the Commission's allowing the Little Shell Band to participate in the proceeding as an "identifiable group" along with the Turtle Mountain Band and the Pembina Band. But the Little Shells had participated from the beginning and did not seek to enter in circumstances comparable to the late and conflictual situation present here. The flat statement in connection with the court's discussion of that question [the right of other member entitles to participate], that "[the] exclusive right granted [by section 10] to such an organization extends only to the representation of its own members" (490 F.2d at 954, 203 Ct. Cl. at 459) was overly broad and is not fully applicable to a case like this in which one organized entity *prima facie* represents the whole ancestral group over many years.

Western Shoshone Legal Defense & Education Association v. United States, 531 F.2d 495, 504 n.18.[18]

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[18] The *Turtle Mountain Band* decision relied upon an earlier holding in *McGhee v. United States*, 122 Ct.Cl. 380, *cert denied*, 344 U.S. 856 (1952), stating:

> As we held in *McGhee*, the ancestral group "owns" the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity. 122 Ct.Cl. at 386-88. The conclusion reached in *McGhee* is that an officially organized group of descendants of the ancestral entity, and an identifiable, but unorganized group of descendants, are both entitled to separate representation in proceedings before the Commission. *Id. See also Cherokee Freedom v. United States*, 195 Ct.Cl. 39, 45 (1971). This principle is controlling here and authorized the separate participation by the Little Shell plaintiffs whom the

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The Commission, faced with yet a later challenge to the Temoak Bands' authority to represent the entire group, cited both *Turtle Mountain Band* and *Western Shoshone Legal Defense & Education Association* and, *without deciding* the issue of the Temoak Bands' exclusive representation of the "Western Shoshone identifiable group," ruled against the request for a stay to remove unextinguished-title lands, on grounds of the lateness of the request. *Temoak Bands v. United States*, 40 Ind. Cl. Comm. 305, 308 (1977). Thus the Commission, even after it realized that the propriety of the Temoak Bands' representation of the entire identifiable group had not been determined and was highly questionable, decided that it was better to let the ship sail on to its destination than

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> Commission could permissably deem, in view of the band's genesis and history, as an "identifiable group."
>
> Nor does the exception in section 10 of the Indian Claims Commission Act, note 35, *supra*, for tribal organizations recognized by the Secretary of the Interior help the Turtle Mountain position. The exclusive right granted to such an organization extends only to the representation of its own members. The Little Shell petitioners claim to represent only the dissident group which split off during the McCumber negotiations. It would be different if all Little Shells were now Turtle Mountain Band members also, but this has not been asserted or shown. Since the participants in the Little Shell Bands are not wholly included in the membership of the present-day Turtle Mountain Band, the Little Shells are entitled to separate representation before the Commission. There was no error in allowing them to proceed as a claiming party.

206 Ct. Cl. at 458-59. The concept of a representative which achieves its representative status by *"prima facie"* acting as representative over many years, by adverse possession, as it were, regardless of the propriety or adequacy of such representation raises a serious due process problem discussed *infra* in argument at p. 29 *et seq.*

to interrupt the voyage by questioning who was at the wheel.

It is beyond question that there was strong opposition to the claim strategy by a "significant element",[16] if not the overwhelming majority,[17] of the unrepresented member-entities and individual members of the "Western Shoshone identifiable group" from the very inception, and throughout the course, of that proceeding.[18] The Danns were always prominently associated with that opposition. It must be stressed that the Danns were not members, and could not be members, of the Temoak Bands, and that the subject lands were not under the geographical jurisdiction of the Temoak Bands. In the past, the Dann Band adhered politically to the Traditional Council, which attempted to function as a continuation of the council that entered into the Treaty of Ruby Valley, 18 Stat. 689, with the United States.[19] Currently, the Dann Band is recog-

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[16] Dept. of Interior Memorandum from Commissioner of Indian Affairs, March 11, 1980. (App. J 4.) Dept. of Interior Memorandum from Associate Solicitor Indian Affairs, August 12, 1977. (App. H 6-7.)

[17] Rusco, *Organization of the Te-Moak Bands of Western Shoshone* XXV Nevada Hist. Soc. Q. 175. (Fall 1982) (See n.14, *supra*).

[18] *Id.* That the Government managed to conceal that opposition and the Commission remained impassively ignorant of the problem, did not mitigate the latches of the unrepresented majority of the group, in the view of the Court of Claims. This view is contrary to that of its own ruling in *United States v. Pueblo of Taos*, 515 F.2d 1404 (Ct. Cl. 1975), which held that a tribunal adjudicating an Indian claim had a positive duty to inquire and determine if Indians were adequately informed and had consented to a claims strategy and that a failure to do so rendered its conclusions open to attack in separate litigation decades later.

[19] Rusco, *Op. cit. supra;* Department of Interior Memorandum from Assoc. Solicitor, Indian Affairs, August 12, 1977. (App. H 6-7.)

nized as a co-equal member of the Western Shoshone National Council, along with the Temoak Bands and all other Western Shoshone entities and organizations within Western Shoshone country.[20] The National Council recently was recognized by the Bureau of Indian Affairs as the proper representative of the "Western Shoshone identifiable group" in dealing with the United States regarding both the Claims Commission award and Western Shoshone land claims.[21]

While the opposition to the claims strategy of the Temoak Bands by the unrepresented portion of the group was well known to the Bureau of Indian Affairs, [22] it was not until 1974 that the Western Shoshone Legal Defense and Education Association and Frank Temoke, the Chief of the Traditional Council, obtained legal representation and approached the Indian Claims Commission directly in an effort to intervene and amend the Western Shoshone claim to withdraw unextinguished aboriginal title and treaty title lands.[23] The would-be intervenors filed a veri-

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[20] Organization Statement, Western Shoshone National Council. (App. T).

[21] Letter, Deputy Ass't Sec., Indian Affairs, April 23, 1984. (App. P).

[22] Dept. of Interior Memorandum from Commissioner of Indian Affairs, March 11, 1980. (App. J 4.) Dept. of Interior Memorandum from Associate Solicitor Indian Affairs, August 12, 1977. (App. H 6-7.)

[23] The Brief of the United States mentions only the assertion of unextinguished aboriginal title. Throughout the proceedings, the would-be intervenors in the Indian Claims Commission and the Danns in the courts below have asserted recognized treaty title and treaty rights. Footnote one in the Opinion of the court below indicates that the Danns aband-

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fied petition in accordance with 25 U.S.C. (1976 ed) 70i and Sections 1(c), 8(b) and 13, alleging collusion between the representative entity, the Temoak Bands, and the United States, in that those parties jointly represented to the Commission that all Western Shoshone lands had been taken by the United States when, in fact and law, the greater portion of the lands within the boundaries of the Treaty of Ruby Valley, *supra*, had not been taken.

There followed a multiple exchange of pleadings which developed considerable factual disputes, and the petitioners for intervention repeatedly requested an evidentiary hearing. The Commission ordered the parties to appear at an oral argument limited to "collusion," and the Commission's counsel specifically instructed the attorney for the petitioners that the Commission would not accept evidence or documents,[24] nor would it hear argument concerning the underlying substantive issue of continuing title to the land.[25] During the oral argument counsel for the petitioners notified the Commission of the continuing use and possession of the lands by the Danns and other Western Shoshone, and of the pendency of the instant case. The claims lawyer for the identifiable group admitted that the Western Shoshone all wanted to preserve what land they

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oned the claim of recognized title. Actually, they continued to assert it, but contended that since their unextinguished aboriginal title was clear and was sufficient to defeat the Government's claim, it was not necessary to decide whether that title had been recognized under the Treaty of Ruby Valley, *supra*.

[24] Transcript, Indian Claims Comm. Docket 326-K, Nov. 14, 1974 Exhibit 8-D, pp. 67-68. *See, also Id.* at 56.

[25] *Ibid.* at p. 15.

had, and assured the Commission that its action would have no effect on title.[26]

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[26] [MR. BARKER]: I have met with the Indians many times to determine how to determine these problems and have sought guidance. And the question has been raised, well, we want our land. We don't want termination.

Now, we go to one of these meetings and I am frank to say they will all say "Well, we don't want termination. We will lose our reservation. We will lose our allottments. We will be moved off our land."

This litigation means we are selling our land. And the answer is very simple. You are not selling your land. Anything that has been taken has been taken. This lawsuit is one for compensation. It doesn't change your title one bit. We aren't affecting your title, we are not selling anything. It is what has been extinguished and taken.

Transcript, Oral Argument, Indian Claims Commission, Docket No. 326-K, Nov. 14, 1974 (Exhibit 8-D) p. 21.

MR. BARKER: Not private rights, tribal rights, their private individual rights in these lands. That is not what is involved here. We are talking about the tribal claim.

COMMISSIONER PIERCE: Is that the case pending in the District Court in Nevada?

MR. BARKER: That is the Dann case in the District Court in Nevada. . . .

Even so, that is a question of a private right to grazing on some land. That wouldn't be determinative of our case at all. It wouldn't have anything to do with aboriginal title of the Western Shoshone. It may be determinative of whether these individuals have some rights in that land but it wouldn't determine the tribal claim.

COMMISSIONER PIERCE: The judgment in this case would not affect the individual's rights, would it?

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The Commission denied the intervention petition because it found no evidence of collusion in the record made by the parties charged with that collusion. *Western Shoshone Legal Defense & Education Association v. United States*, 35 Ind. Cl. Comm. 457 (1975). This ruling was appealed and the Court of Claims affirmed, primarily because it felt that intervenors were guilty of latches. 531 F.2d 495 (1976).[27] As part of its rationale, the court suggested an alternative solution to the relief requested which directly addresses the question presented here:

> Appellants' fear, as we have noted, is that payment of the judgment will, under Section 22 of the Claims Commission Act, 25 U.S.C. Section 70u, bar the Identifiable Group from thereafter claiming the land as still its own. They say they seek a final determination of this issue of continued ownership before an

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> MR. BARKER: It's my view that it doesn't have anything to do with the individual rights.
>
> Now, the fact that the tribe has been compensated for the extinguishment of Indian title—
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> COMMISSIONER PIERCE: Tribal Indian title.
>
> MR. BARKER: Tribal Indian title, of course, would not be res judicata on individual claims. They wouldn't even be a party to the litigation.

Ibid. at pp. 25-26. The Government's counsel did not dispute these views.

[27] *Contra, United States v. Pueblo of Taos*, 515 F.2d 1404 (Ct. Cl. 1975) (Discussed n.18, *supra*). The only way *Temoak Bands* and *Pueblo of Taos* can be reconciled is to interpret the former as acknowledging that collateral estoppel and res judicata could not apply to the instant case and that the preclusive effect of Section 22(a) would not fall until Congress issued the "direction which is necessary to pay the award," that is, approved a distribution plan.

> award is made, and contend that a pending suit in the District Court for Nevada furnishes that opportunity. The Commission refused to stay its proceedings pending resolution of the Nevada action. We think this was a permissible choice on the Commission's part. Postponement of the conclusion of the present proceeding will harm the Indians monetarily if their claim to continued ownership fails. *See* note 10 *supra*. It may also be noted that the bar of Section 22 does not fall until payment (*see* note 2 *supra*). If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation ***and direction which will be necessary to pay the award.*** *Cf. Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 951-53, 203 Ct. Cl. 426, 454-56 (1974). That course is still open if the majority of the Identifiable Group can be persuaded to follow it.

531 F.2d at 503. [Emphasis added].

The Court of Claims obviously weighed this alternative relief as a factor in arriving at its decision to deny the petition to intervene. This Court denied a petition for a writ of *certiorari*. 429 U.S. 885 (1976).

The Temoak Bands reacted to the decision of the Court of Claims by filing pleadings, supported by resolutions of its federally recognized business council,[28] to inform the Commission that it had not actually elected to pursue a money award at the risk of losing land belonging to the "identifiable group," moving itself for a stay to amend the claim, and attempting to discharge the claims lawyer on behalf of the entire identifiable group, all to no avail. As discussed earlier, the Commission refused the

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[28] App. G, H.

stay without deciding who was in control of the prosecution of the litigation. *Western Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457 (1975).

Once again, the Court of Claims refused to reverse the Commission, on grounds of the lateness of the supposed "change in position" by the Temoak Bands. *Temoak Bands v. United States*, 593, F.2d 994 (1979) *cert. denied*, 444 U.S. 973. In so doing, the Court of Claims reiterated its alternative solution:

> If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress as recommended in *Western Shoshone*, 531 F.2d at 503 n. 16, 209 Ct. Cl. at 59 n. 16.

593 F.2d at 999.[29]

Upon denial of the Temoak Bands' petition for *certiorari*, that decision concluded the claims case. The award of a money judgment in favor of the Western Shoshone Identifiable Group was certified (discussed *supra*), and distribution plans were proposed by the Secretary of the Interior and a "Western Shoshone Distribution Planning Committee". On July 26, 1980, at a Bureau of Indian Affairs Public Hearing of Record, the Western Shoshone people overwhelmingly rejected the proposed distribution plans. The Government then sought an extension of time to implement a plan for final payment automatically, that is, without full Congressional approval. 25 U.S.C. 118, 1404 (discussed in argument, *infra*). In response to appeals

[29] The Court of Claims did note that it had become somewhat more difficult for the Western Shoshone to stop payment in Congress, because the need for a separate appropriation Act for each award had been eliminated by amendment of the standard appropriation act, 31 U.S.C. 724a.

of the Western Shoshones, the Chairman of the Senate Select Committee on Indian Affairs informed the Department of Interior that the extension would not be granted and legislation would be required, stating in part:

> It appears that a significant number of Western Shoshone people oppose acceptance of the award at this time. There is pending litigation in the case of *U.S. v. Dann* in the U.S. District Court for the District of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue.

Letter, Senator John Melcher, August 4, 1980, (App. M).

On appeal of the instant case to the court of appeals below, the Danns argued that the district court erred in finding that the report of the clerk of the Court of Claims certifying the final award extinguished the Danns' title to land they had continuously occupied, for several reasons. First, the Indian Claims Commission and the Court of Claims (to which the case was transferred when the Commission expired) lacked jurisdiction to extinguish aboriginal title and, in any event, the Indian Claims Commission Act was not the sort of Congressional action which met the standards for extinguishment of aboriginal title set out in a series of Supreme Court decisions.[30]

Second, the Danns argued that their continuing use and occupancy of the subject lands was protected by Article VI of the Treaty of Ruby Valley, *supra*, and the Commission could not abrogate a treaty.

[30] *E.g., Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (Injunction against Secretary of Interior, issuing patent).

Third, the Danns argued that they possessed *individual* Indian title to the lands that they continuously used and occupied, regardless of any alleged abandonment by the Western Shoshone identifiable group.[31] The Danns argued that their continuing ownership in the 1970's was clearly not a claim for money damages arising before 1946 and could not have been litigated in the Claims Commission or terminated by a discharge of ancient money claims under the Indian Claims Commission Act, which conferred jurisdiction only for claims arising before 1946.

The Government argued that the Danns' claim to title was precluded under the Indian Claims Commission Act by payment of an award in the *Temoak Bands* case, and that payment had occurred. The Danns countered that, because the funds deposited in the treasury could not be used or distributed without further Congressional action, 25 U.S.C. Section 1401-07, deposit of the award did not constitute actual payment.

Further, the Danns argued that collateral estoppel had no applicability to the extinguishment issue in the instant case because, as the lower court determined, that issue had not been litigated or decided in an adversary context in the claims tribunal.

Neither the arguments of the Danns nor the court of appeals in its decision below adopted the simplistic notion, attributed to them in the Government's brief, that "payment," under the discharge provision of Sec. 22(a) of the Indian Claims Commission Act, must be the actual de-

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[31] *Cramer* v. *United States*, 261 U.S. 219 (1923).

livery of per capita checks to individual Indians. As the court of appeals pointed out,

> no monies have actually passed into the hands of the Western Shoshone group or its members, *nor* have any been used for their benefit. Distribution *and* use of the awarded funds can only take place pursuant to a plan of use or distribution timely prepared by the Secretary of Interior and acquiesced in by Congress, 25 U.S.C. Section 1401-07, or by separate legislation. We are advised that in the present case no timely plan was submitted, so that separate legislation will be required.

Pet. App. 11a-12a. (Emphasis added.) The Court of Appeals found no "payment" not just because distribution to individual Indians was delayed, but because any *use* by the group or by the Secretary, as trustee for the benefit of the group, is contingent upon future Congressional legislation. This contingent nature of the claimed "payment" led the court of appeals to conclude that the "ordinary meaning of 'payment' does not seem satisfied by a transfer of funds that leaves such significant legal blocks in the way of delivery to the payee." *Id.* This statement is true whether or not the "payee" is, as the Government contends, the Secretary of Interior in his capacity as trustee for the Indians; the Secretary cannot exercise his trust functions and serves instead merely as an escrow agent until Congress passes legislation. The Court of Appeals clearly held payment to occur only when Congressional action removes that block and allows use *or* distribution of the award. Pet. App. 15a-16a.[32]

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[32] Whether Congress passes legislation simply allowing a plan to take place, legislates a plan, or, if it chooses, reviews

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The court of appeals was also concerned because the Court of Claims, in affirming the denial of the request to participate in the claim made by a group which included the Danns, did so relying upon its view that their rights would not be foreclosed in the instant litigation until Congress gave the "direction which will be necessary to pay the award." Pet. App. 13a, quoting *Western Shoshone Legal Defense Ass'n v. United States*, 531 F.2d 495, 503 n. 16 (Ct. Clms. 1976). The court of appeals, having found that payment had not occurred and that the avenue proposed by the Court of Claims was indeed available, found it unnecessary to review other issues pertaining to inclusion and representation of the parties and, hence, the question of constitutional due process. See Pet. App. 7a, n.3.

The court of appeals also found it unnecessary to decide whether the Danns' defense in this trespass action is the same "claim" as that involved before the Commission, Pet. App. 9a n. 4, or to discuss individual use and occupancy rights which the Danns may possess independent of any abandonment, or the election of remedies by the "identifiable group" or its constituent entities.

The court of appeals also ruled, as a matter of law, against each of the Government's substantive arguments that Western Shoshone aboriginal title had been extinguished. The Government has not asked this Court to review those rulings.

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this litigation, the entire claim and the status of Indian lands in Nevada is a matter which is within its plenary power and not subject to strictures suggested by the Government or courts. But until Congress does act, the "payment" has not occurred.

SUMMARY OF ARGUMENT

The question presented, whether payment has occurred, need not be answered by the Court because, in any event, the discharge triggered by such payment cannot be used as a writ to eject Indians who have been in continuous occupancy of the subject lands. Such occupancy does not constitute a "claim against the United States." In addition, neither the Danns nor the alleged property-owning group itself were adequately represented before the Indian Claims Commission. In addition to the unextinguished Western Shoshone tribal title, the Danns assert continuous individual, aboriginal title which this Court and the Interior Department has recognized in non-reservation Indians who used "public lands" to support themselve "by their own labors".

"Payment" within the meaning of Sec. 22(a) of the Indian Claims Commission Act has not occurred because any use of the award (including use by the Secretary of the Interior as trustees for the Indians) and its distribution has been blocked by Congress which has required further legislation. Congressional action is required to not only use the award but to define the parties who will share in it and thereby suffer the effect of preclusion.

ARGUMENT

POINT I. Regardless Of Whether Payment Has Been Made There Is No Preclusion Effect On The Instant Case

A. A Discharge of Claims and Demands Under the Indian Claims Commis-

sion Act Does Not Provide a Basis for a Court Order to Take Indian Lands in the First Instance.

The Brief for the United States never clearly explains how the discharge language of Section 22(a) of the Indian Claims Commission Act, which discharges the United States for any monetary liability for claims or demands arising from pre-1946 wrongs to Indians, becomes a predicate for the United States to obtain extraordinary relief to eject Indians from lands they own and which the United States wishes to take for the first time.

Assuming that "payment" within the meaning of Section 22(a), has occurred, that payment constitutes "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." Section 1 of the same Act limits claims to those accruing before August 13, 1946. 25 U.S.C. Section 70a (1976 ed.). As the Brief for the United States concedes, "(t)he Indian Claims Commission had been established in 1946, in order to provide a monetary damages remedy against the United States for wrongs allegedly committed by the United States in its dealings with Indian tribes," Br. 4 The Commission's jurisdiction has been generally accepted as limited to providing such monetary remedies.[11] Therefore, under Section 22(a), the discharge the United States receives is one for monetary liability for pre-1946 wrongs which in the case of the Western Shoshone identifiable group, was for the taking of lands. The Danns have never claimed the United States extinguished, took or even interfered with the use of lands involved here. The discharge language of the Indian Claims Commission Act is simply irrelevant here.

[11] See, e.g., Department of Interior Memorandum from Associate, Sol. Ind. Affairs, Oct. 12, 1977 (App. H7).

Apparently, the Government means that since the Danns are "claiming" to rightfully be in possession of the subject lands, they are bringing a "claim" which was discharged. If so, the argument is an absurd quibble with the word "claim". The Danns' continuing use of their lands is no more a "claim or demand" against the United States than is the use of any other property by its rightful owner. Surely there is no requirement for each citizen of the United States to periodically file with the Court of Claims an inventory of the property that citizen "claims" to own.

Even if the "discharge" language is construed to be broader than the remedy provided by the Act and construed to preclude demands for *the return* of property taken before 1946, the Government would gain nothing since the Danns are making no such demand. They have possession and need no remedy. If the Government has paid for a wrong it did not commit, *its* remedy, if any, is to recover the money and to punish those responsible for the mistake or fraud, not to have a court of equity order that the wrong be committed so that reality will conform to the erroneous award the Government paid.

The relief sought by the Goverment in this case is, to counsel's knowledge, unprecedented. Despite the often disgraceful history of the relationship between the United States and the native peoples of the continent, that history has never included the use of the power of the judicial branch to seize Indian land in the first instance.

The only other decided case on the effect of an Indian Claims Commission award for the "taking" of lands that were not taken in fact but remained in Indian possession is contrary to the Government's position here. In *Osceola v. Kuykendall,* 4 Ind. L. Rep. F. 80 (Three-judge panel, D.C. 1977) (Slip opinion, Brief of Resp. in Opp., App. 3), Seminole Indians who remained in possession of their aboriginal lands in the Everglades brought an action to restrain the Indian Claims Commission from processing a claim brought by other Indians for the taking of all Seminole aboriginal lands in Florida. Osceola, like the Danns and the Western Shoshone Legal Defense Association, was denied access to the Commission to demonostrate that some aboriginal lands had not actually been taken. Osceola claimed that the Commission was taking property without due process of law, on grounds that the effect of the award would be to extinguish the remaining Seminole title. The Government argued in its brief that Osceola's claim was not the same claim as that before the Commission because it was not a tribal claim for damages for a pre-1946 taking. The three-judge panel dismissed the claim, holding that the Commission's proceedings did not threaten the Indians' possessory interest:

> Entry of the judgment will create no new property rights in the United States, for the United States already hold fee simple title to the land, subject only to any rights of possession which plaintiff and others like him may have. Similarly, plaintiff's *right of possession and occupancy will not be affected by the judgment.*

4 Ind. L. Rep. at F-82; Brief of Resp. in Opp., App. 13 (emphasis added). That panel also reviewed the law that: "If Indian title is proven, then the right of occupancy can

be extinguished only by 'plain and unambiguous' act of Congress." (Citing the authorities relied upon by the court of appeals on the merits.) The panel observed:

> Eventually, plaintiff may be required to prove certain of the allegations of his complaint (i.e., that he possessed Indian title and had continuously used and occupied the land) in order to protect his rights against interference by the United States or third parties.

4 Ind. L. Rep. at F-83; Brief of Resp. in Opp., App. 14.

The Government now contends that Mr. Osceola was correct after all, and the practical effect of an Indian Claims Commission award is to pull land from under the feet of Indians who were previously undisturbed in their possession. There is no authority for, and certainly no equity in, that contention.

B. Binding the Danns by a Proceeding in Which They Were Denied Participation Would Deprive Them of Due Process of Law Because Neither the Identifiable Group Nor the Danns Were Adequately Represented.

The Western Shoshone claim in the Indian Claims Commission was not a tribal claim prosecuted by a constituted government of that tribe. The Temoak Bands, a small subdivision of the Western Shoshone people, was granted the right to represent the entire "Western Shoshone identifiable group" by the Indian Claims Commission. *Shoshone Tribe of Wind River v. United States,* 11 Ind. Cl. Comm. 417, 445 (1962). The Commission found that the "identifiable group" was a land-owning entity in the past, although it did not in the past have a central political structure nor did it have such a structure at the

time the claim was brought.[34] Thus, the entity which owned the land or the claim for the taking of land, was without any structure for making decisions pertaining to its assets or litigation strategy. The Commission's designation of a single subdivision of that entity, the Temoak Bands, to represent those collective interests was an arbitrary action, unsupported by any inquiry or findings concerning its standing to perform that function.

The Danns do not contend that it is constitutionally impossible for such an unstructured entity to bring a claim through a representative. The Danns merely assert that due process requires verification that the representative does in fact represent the affected interests of the entity and its constituent parts, and that such verification was manifestly lacking in the claims case.

As discussed *supra* at n. 13, the Claims Commission concluded that 't'he Temoak Bands has the right to maintain this action for and on behalf *of the descendants* of the Western Shoshone identifiable group." *Shoshone Tribe of Wind River v. United States,* 11 Ind. Cl. Comm. 417, 446 (1962). [emphasis added]. However, that conclusion was unsupported by anything in the Findings upon which it was based and did not even address the question whether the Temoak Bands was a proper and adequate entity to represent and protect the interests of "the descendants of the identifiable group," let alone the interests of the identifiable group itself. A reading of the entire record or just the published opinions makes it abundantly clear that the Commission took no steps to see that existing property

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[34] *Id,* 11 Ind. Cl. Comm. at 391, 402, 403, 438; Rusco, *The Organization of the Te-Moak Bands of Western Shoshone,* XXV Nevada Hist. Soc. Q. 175 (Fall 1982).

rights of the identifiable group or its members were protected. The Commission, moreover, did not perceive that any such property rights were involved or could be affected. The Commission's view was that the only interested parties were descendants of a historical group that had a monetary claim and each member had a more or less identical interest to see that claim maximized.

The Commission's view was incorrect because the entity did have existing property rights and its membership did desire those rights to be protected. As the Associate Solicitor of the Department of the Interior, Indian Affairs, reported in 1977:

> Among the Western Shoshone there are groups who have persisted in their efforts to recover a substantial land base ever since their claim was first conceived in the 1920's. The Shoshone are impecunious and, consistent with their aboriginal social structure, without a strong central leadership. As a result, although the Shoshone who assert that their title to land is intact may be in the majority, it is those seeking damages who are accommodated by the structure of the Indian Claims Commission Act. The Act assumes that Indian title is extinguished and provides for money damages as exclusive remedy for claimants.

Department of Interior Memorandum, Oct 12, 1977. (App. H).

There can be no preclusion effect in the circumstances under which the Temoak Band purported to represent the conglomerate interests of unrepresented parties. *See, e.g., Hansberry v. Lee,* 311 U.S. 32 (1940) [Initial litigation concerning agreement among various property owners not binding as to non-litigant parties to agreement where there were possible conflicting interests as to enforcement

of agreement.]; *Tomijasu v. Crolden*, 358 F.2d 651 (1966) [litigants named in first action not given an opportunity to participate were not barred in second action]. This Court has emphasized that due process requires a "full and fair opportunity to litigate." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 (1981), *rehearing denied*, 458 U.S. 1133 (1982). In order to allow a previous proceeding preclusive effect on subsequent actions a court must be satisfied as to the "quality, extensiveness [and] fairness followed in [the] prior litigation." *Montana v. United States*, 440 U.S. 147, 164 n. 11 (1970).

This court has further made clear that these concepts of representation permeate formal arrangements of parties or descriptions of rights purporting to fit the edicts of due process. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 at 481; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974); *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1945). The Government's construction of the prior litigation, as a bar to the property claims of the Dann group, attacks and undermines the essence of due process. *Cf. Hansberry v. Lee, supra*, 311 U.S. at 42-45.

The Government insists that since the claim was a "tribal" claim, individuals had no right of representation. However, the interests of individual descendants in a share of money was the only interest considered by the Commission. The Commission itself took no precautions whatsoever to see that the "tribe" or "group" property interest was protected. The Danns believe that they had a right to participate to protect their own property rights, but, if not, *some* person or entity should have participated to protect the common property interest if the Govern-

ment is going to seek to alter existing property rights on the basis of that proceeding. To adjudicate the property rights of an "identifiable group" where only "descendants of the identifiable group" purport to be represented is to deprive the "identifiable group" itself of due process of law.

C. The Danns Have Individual Use and Occupancy Rights to the Subject Lands Which Survive Any Abandonment by the Identifiable Group.

The Government is in error when it asserts that individual Indians cannot possess individual property rights which derive from tribal aboriginal or treaty rights.

In *Cramer v. United States*, 261 U.S. 219 (1923), this Court upheld the cancellation of a patent to the extent that it purported to convey lands occupied by three individual Indians under color of an unratified treaty.[35] The patentee urged "that occupancy by individual Indians does not come within the exceptive provision of the grant."[36]

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[35] The fact that the Indians believed that they held the lands by treaty right as part of a tribe and initially asserted a treaty reservation did not preclude them from ultimately relying on their individual Indian possessory rights.

[36] "Sec. 2. . . . and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections. . . ."

Act of July 25, 1866, 14 Stat. 239.

The Court held to the contrary:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher v. Wetherby*, 95 U.S. 517; *Minnesota v. Hitchcock*, 185 U.S. 373, 385. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of a civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. *Midway Co. v. Eaton*, 183 U.S. 602, 609; *Hastings & Dakota R.R. Co. v. Whitney*, 132 U.S. 357, 366. That Department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them. . . .

261 at 227.[37] The Court went on to say:

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[37] The Department of the Interior, for at least 100 years, has been required by its own regulations to take steps to protect Indian occupants of public lands. On May 31, 1884, Commissioner McFarland issued a circular approved by the Secretary, to all registers and receivers as follows:

> Information having been received from the War Department of attempts of white men to dispossess non-reservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been

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In *Ma-Gee-See v. Johnson*, 30 L.D. 124, Johnson had made an entry under Section 2289, Rev. Stats.,

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> received from other sources in reference to other localities where land is occupied by Indians who are making efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.
>
> In order that the homes and improvements of such Indians may be protected, as intended by these instructions, you are directed to ascertain, by whatever means may be at your command, whether any lands in your district are occupied by Indian inhabitants, and the locality of their possession and improvements as near as may be, and to allow no entries of filings upon any such lands. When the fact of Indian occupancy is denied or doubtful, the proper investigation will be ordered prior to the allowance of adverse claims. Where lands are unsurveyed no appropriation will be allowed within the region of Indian settlements until the surveys have been made and the land occupied by Indians ascertained and defined.

3 L.D. 371.

Three years later the Acting Secretary of the Interior H. L. Muldrow reaffirmed the above directive, stating that it applied "to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and territories of the United States." *Circular*, 6 L.D. 341 (Oct. 26, 1887). The 1887 circular was approved for reprinting without change on December 20, 1903. *Land in Possession of Indian Occupants*, 32 L.D. 382 (1903). Protection for Indian occupants was continued in regulations issued in 1928. *Indian Allotments on the Public Domain, etc.*, 52 L.D. 383, 394 (Feb. 1, 1928). The first published volume of the Code of Federal Regulations included this protection, 43 C.F.R. Section 176.20 (1938), which has been continued to this date. *See*, 43 C.F.R. Sections 2091.5 and 2091.6-3.

which applied to "unappropriated public lands." It appeared that at the time of the entry and for some time thereafter the land had been in the possession and use of the plaintiff, an Indian. It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry. . . .

The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government which we have mentioned. To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.

261 U.S. at 228-29.[38]

In *U.S. v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), this Court found that the Walapais Indians, by negotiating for and accepting a reservation, relinguished "*tribal claims to lands*" but noted at that point:

> As distinguished from individual rights of occupancy, if any, as were involved in *Cramer v. United States*, *supra*, 261 U.S. 219, but which, not being in issue here, are not foreclosed or affected by the judgment in this case.

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[38] The Court limited the cancellation of the patent to the lands enclosed by the Indians fence. The subject lands are not fenced, although other lands of the Danns are. However, land use on the high desert of Nevada differs from the farming lands in California. Private grazing land in the area is not fenced because of the expense involved in relationship to the per acre value of the land and because fencing is considered antisocial. Alien stock are periodically returned to their rightful areas in a cooperative effort of the owners. The subject lands have been used consistently by the Danns "to support themselves by their own labor." See note 5, *supra*.

314 U.S. at 357-58, n. 23.

Hence, even if the Court were to indulge the fiction that the "Western Shoshone identifiable group" made a conscious election to relinquish the tribal claim to lands in favor of the money claim in the Claims Commission, the relinquishment of that *tribal* land claim would not foreclose the Danns' (and other Western Shoshones') individual possessory rights.

The Government strongly contends throughout its Brief for the United States that the Western Shoshone claim before the Indian Claim Commission was a "tribal claim" and not a collection of "individual claims." Therefore, the Government must concede that, if the discharge provision of Sec. 22(a) precludes a claim to otherwise unextinguished title, such preclusion could apply only to a *tribal* claim and not to existing individual possessory rights.[39]

Because the decision of the court of appeals below can be upheld on the narrow grounds that, in any event, the Danns cannot be ejected from lands they have continuously used, occupied and depended upon, it is unnecessary for the Court to decide the question presented in this case or to rule upon the validity of any Western Shoshone title to lands not involved in this case. The Anglo-American system of property law, which treats lands on a tract-by-tract and case-by-case basis, has served this nation well. The desire of the Government in

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[39] In fact, this was the Government's successful contention in *Osceola v. Kuykendall*, 4 Inc. L. Rep. F 80 (Three judge panel, D.C. 1977) (Slip opinion, Brief of Resp. in Opp., App. 3) (discussed *supra* at p. 28).

this discrete case to erect a barrier against the operation of that system with respect to any of its claimed lands in central Nevada should not be indulged (not to mention the misguided zeal of the National Association of Title Insurance Companies to inject, as *amicus curiae*, private titles never questioned by the Western Shoshone). The Danns objected strenuously to other Indians litigating their interests before the Indian Claims Commission and concede that they, themselves, cannot adequately represent other Western Shoshone rights of which they may not even be aware.

POINT II: "Payment" Within The Meaning of Section 22(a) Of The Act Has Not Occurred

The Government's argument that payment automatically occurs when funds are transferred to the Department of the Interior and deposited in a treasury account rests solely upon inferences drawn from legislative history, and irrelevant citations to the case law on the fiduciary duty of the Government. The government chooses to ignore a specific statute defining "payments in satisfaction of [Indian] judgments," 25 U.S.C. Section 118, and specific references by Congress to this very litigation and the intent of Congress with regard to the disposition of the award in the Western Shoshone claims case.

As the discharge provision of the Indian Claims Commission Act (I.C.C.A.), Sec. 22, 60 Stat. 1055, 25 U.S.C. Section 70(u) (1976 ed.), makes clear, "appropriation of funds for payment" and "payment" are two separate events.

While it is true that the amendment of the standing appropriations act, 31 U.S.C. (Supp. V) Section 724, eliminated the opportunity for Indians to object to an I.C.C. award during the appropriation process, nothing in the amendment suggests that "payment" is accomplished by transfer of the funds to the Secretary of the Interior as guardian for the Indians, as the Government seems to claim.

Section 118 of Title 25, U.S.C., defines what constitutes "payment" of funds appropriated for payment.[40]

> Payments to Indians made from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law.

Thus, it is clear that "payment" is accomplished only when made to Indians *by* Interior, not *to* Interior as the Government contends.

The Distribution of Judgment Funds Act, 25 U.S.C. Section 1404, imposed detailed procedures upon the Interior Department for fulfillment of its duty under 25 U.S.C. Section 118 in regard to judgments of the Indian

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[40] The Government argues this statute has no application because it was passed before the I.C.C.A. and, in the Government's view, it applies only to judgments for individual Indians. The statute was in effect at the time Congress passed the I.C.C.A., and there is no reason to believe that Congress did not expect "payment" under the I.C.C.A. to be in accordance with this existing law, particularly when Congress made no provision in the I.C.C.A. pertaining to the manner of payment.

Claims Commission. While the Distribution Act, after amendment of the standing appropriations act, made it *possible* for the Interior Department to implement a distribution plan and effect "payment" without further action of Congress, the Indian beneficiaries had two ways of delaying or stopping the process. First, 25 U.S.C. Section 1405 required submission to Congress of a distribution plan, which could be vetoed by resolution of either House; this may have been the step to which the Court of Claims referred when it commented that it "looks as if the Temoaks would have to get Congress to act affirmatively." *Temoak Bands v. United States*, 593 F.2d 994, 999 (Ct.Cl. 1979) (discussed *infra* at p. 43).

The Act provides yet another obstacle to "automatic payment." If the Department of the Interior fails to submit a distribution plan to Congress within the time prescribed, and does not get an extension of the time period, the Department must then seek legislation to authorize the use or distribution of the funds appropriated for satisfaction of the judgment. 25 U.S.C. Section 1402(a), (b), 1405(b).

In the face of massive Western Shoshone resistance to acceptance of a money award, the Department of Interior failed to produce a distribution plan within the prescribed time. An extension of time was sought by the Government, pursuant to 25 U.S.C. Section 1402(b), but was denied by the Senate Select Committee on Indian Affairs. Letter, Chairman John Melcher to Deputy Assistant Secretary of Interior, August 4, 1980. (Appendix M). Among the reasons given by the Chairman of that congressional committee for denying the extension and requiring legislation were that, "a significant number

of Western Shoshone people oppose acceptance of the award" and:

> There is pending litigation in the case of *U.S. v. Dann* in the U.S. District Court for the District of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue *(Id.)*.

Thus, the Western Shoshone succeeded in postponing the payment to Indians in satisfaction of the award required by 25 U.S.C. Section 118 by following the suggestion of the Court of Claims and getting Congress "to delay . . . the direction which will be necessary to pay the award" so that they could "try out the issue of current title." *Western Shoshone Legal Defense & Education Association v. United States*, 531 F.2d 495, 503 n.16.

The Report of the Senate Select Committee accompanying a later amendment to the Distribution Act, which approved distribution plans for other awards, stated:

> The Department of the Interior identified five judgments or awards which will require legislation irregardless [sic] of the passage of the amendments in this bill . . . Western Shoshone. . . . The criteria employed by the Department in identifying these claims revolve around *pending collateral litigation*, strong feelings that there should be a land settlement, factionalism within the beneficiary entities respecting distribution of the award, or inability of competing entities to agree on a division of the award.

Senate Report 97-658, at 3 (emphasis added). *See also* Senate Report 96-469, wherein the Acting Assistant Secre-

tary refers to the failure to meet a distribution plan deadline as having the effect of "stopping payment."

Such specific congressional statements respecting the instant case, as well as similar statements made to Congress by the Interior Department itself, clearly refute the Government's contention that Congress' role is limited to oversight of the Interior Department's performance as fiduciary of Indian trust funds in general, and that the award had already been accepted by the Secretary on behalf of the Indians.

It should also be noted that the recipient of the award is the "Western Shoshone identifiable group," an entity that has no existence other than as the nominal claimant before the Indian Claims Commission and is yet to be defined by the distribution legislation. That a judgment can be paid and satisfied without identifying even the class of persons receiving it is patently absurd.[41]

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[41] The Government claims the funds were deposited to an account for the tribal claimant which was the Western Shoshone Identifiable Group. Brief for the U.S. p. 12. Actually, they were placed in an account for the Temoak Bands, according to the documentation presented by the Government to the court of appeals below. The Danns belong to a separate political subdivision of the Western Shoshone Nation, and have no direct connection to the Temoak Bands. Assuming that the Temoak Band is trustee, in turn, for the "Western Shoshone Identifiable Group" it should be borne in mind that the "group" is still undefined and is not coterminus with the Western Shoshone Nation. The distribution could ultimately be limited to those bands which have federally approved tribal governments, thereby excluding the Danns from the award. The Government does not contest that the Danns could be excluded. Brief of U.S. p. 29. The court below declined to decide whether the Danns were in privity with "the claimants". Pet. p. 7a, n.3.

The Western Shoshone who sought to intervene and stay the proceedings before the Indian Claims Commission informed the Commission of the pendency of this action and the opportunity it afforded for a determination of title in an adversary setting. When the Court of Claims affirmed the Commission's denial of the intervention, that court addressed the efforts of the Danns in the instant case as follows:

> If the majority of the Identifiable Group wishes to postpone payment in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation *and direction which will be necessary to pay the award* . . . That course is still open if the majority of the Identifiable Group can be persuaded to follow it.

Western Shoshone Legal Defense & Education Association v. United States, 531 F.2d 495, 503 n.16 (1976) [Citation omitted, emphasis added]. The Court of Claims reiterated this advice at the time that the "Representative Plaintiff"[42] itself attempted to delay the award, and appealed the Commission's denial of the stay, *Temoak Bands v. United States,* 593 F.2d 994, 997 (1979), speaking of the earlier, intervention decision:

> As regards the fear of the intervenors that they might lose the right to claim title if the case proceeded to final judgment, we pointed out that by Section 22 of the Act, 25 U.S.C. Section 70u, the United States would not be discharged of any claim,

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[42] The Temoak Bands, which had been held to be the "exclusive representative" of the Identifiable Group in the intervention decision, *Western Shoshone Legal Defense & Educ. Ass'n v. United States,* 531 F.2d 495 (Ct. Clms. 1976), was designated an adverse party to the identifiable group in this decision, and presumably, thereby, lost its status as the exclusive representative plaintif.

including one that the Western Shoshones owned the land, until the judgment was reported to Congress, *money to pay it appropriated, and payment made.* The intervenors might, we said, ask Congress to delay payment . . . If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress as recommended in *Western Shoshone.* 531 F.2d at 503 n.16, 209 Ct.Cl. at 59, n.16. If Congress wishes to alter or undo the normal course of Indian Claims Commission adjudication, it knows how to do it. *Cf.* Act of March 13, 1978, Pub.L.No. 95-243, 92 Stat. 153. The matter is *somewhat* changed since the *Western Shoshone* footnote because Congress can no longer *stop the payment* and defer the extinguishment of the title claim, *just* by not appropriating. *Id.* at 999 [Emphasis added].

The Court of Claims then went on to discuss the amendment of the standing appropriation act, but at no time suggested that that amendment made it *impossible* to stop the payment. The Court of Claims merely observed that stopping payment could no longer be accomplished at the appropriation stage, and it "looks as if" the Indians would have to get Congress to act affirmatively. As the quoted language makes clear the Court of Claims renewed its suggestion that the Indians should stop the payment and the feared discharge by appealing to Congress. The Western Shoshone did just that. In response, Congress deliberately withheld the "direction which will be necessary to pay the award" mentioned in *Western Shoshone Legal Defense & Education Association,* quoted *supra* at 43.

The Court of Claims' suggestion that expropriation of existing title could be averted at an even later stage, by exercise of Congress' plenary jurisdiction in separate

legislation, by no means excludes relief at an earlier stage. That court suggested that payment itself could still be stopped despite the unavailability of hearings at the appropriation stage, and indicated once again, in the quoted language, *supra,* that final report, appropriation of money and payment were three separate events.

The Government concludes that "payment" within the meaning of Section 22(a), has occurred by analyzing the transaction strictly from the point of view of the Government. From the Government's vantage, payment has occurred because it has, in its capacity as debtor, "paid out" money in the sense that it has delivered that money to itself in its capacity as "trustee", and is liable in that capacity to the ultimate beneficiaries if it misappropriates the money. The authorities cited in support of this perception, however, are wholly irrelevant to the question of when "payment" and "discharge" occur under the Indian Claims Commission Act or under any analagous act or situation.

A more accurate perception would be that the funds in the instant case are, in effect, in escrow unless and until Congress releases them, with the Government acting as escrow agent.[43] Such an analogy is not inconsistent with the notions that the Government has irrevocably committed the funds[44] and that it can be held liable for misapplication[45], or with the circumstance that beneficial

---

[43] 28 *Am Jur 2d, Escrow,* Sections 1 and 2. Technically this arrangement is not an escrow, because it arises by virtue of a statute rather than mutual agreement. *Ibid,* section 7.

[44] *Id.* Section 8.

[45] *Id.* Sections 18 and 20.

or equitable title can be construed, for some purposes, to be in some as yet undefined group of beneficiaries (or deliverees).[46]

From the viewpoint of the "payee" there is clearly no "payment" because the delivery or use of the funds is conditional upon future Congressional action. This is not the simplistic argument, attributed to the Danns by the Government, that no payment occurs until funds are actually distributed to individual Indians. The Danns contend that no payment occurs while the funds are effectively in escrow awaiting Congressional action. Conceding for purposes of this argument that "payment" can be made to the Secretary of Interior and accepted by him,[47] any such payment does not occur until Congress acts and it becomes lawful for the Secretary to use the funds as trustee for the benefit of the identifiable group or, to distribute them. Not only is it entirely possible that the Danns will never receive any benefit from the funds, as the Government concedes[48], but there is no assurance that even the "Western Shoshone identifiable group", however defined, will derive any benefits whatever from the judgment fund.

When Congress exercised a "pocket veto" by refusing to extend the deadline for adoption of a distribution plan

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[46] *Id.* Section 10, p. 17.

[47] One has to wonder whether it is possible for the Secretary to accept a fund for a ward under circumstances he knows are detrimental to the ward and repugnant to him, and at the same time beneficial to the Secretary in his capacity as steward of the public lands of the United States.

[48] The Brief of United States claims that it is irrelevant that the Danns may or may not share in the award, p. 29, n.15.

(Letter, Senate Select Comm., Indian Affairs, App. M), it blocked *any* use or distribution of the fund and did indeed stop "payment," using the plain meaning of that word.

The discharge language of Section 22(a) of the Indian Claims Commission Act (I.C.C.A.), including the triggering of discharge by "payment," is identical to that used in the discharge provisions which generally apply to judgments of the Court of Claims. 28 U.S.C. Section 2517b. The Government makes no argument that "payment" as used in the I.C.C.A. has any meaning other than its ordinary meaning, and the General Counsel of the General Accounting Office in an opinion, B-179425-O.M., (App. D), interpreting "payment" used in yet another statute, has adopted the standard definition from 60 *Am Jur* 2d, *Payment*.

> "Payment" is:
>
> (1) the discharge of an obligation in whole or in part, (2) by the actual or constructive delivery, (3) of money or its equivalent, such as property, (4) by the obligor or someone for him, (5) to the obligee, (6) for the purpose of extinguishing the obligation in whole or in part, and (7) its acceptance as such by the obligee.

The court of appeals was correct in ruling that the delivery of funds to the Secretary of Interior to hold, at interest, without the ability to use the funds for any purpose or distribute them, did not satisfy the ordinary meaning of "payment." Pet. App. 12a. This would seem to be particularly true where the Western Shoshone had made clear their reluctance to accept a money award to the Department of the Interior and the appropriate Congressional Committee. See, App. H, I, J 6-8, K, L.

The decision of the court of appeals is in no way dependent upon an intent of Congress to review claims litigation *on the merits* prior to payment. That is a red herring which the Government pointlessly drags through the legislative history.

As the Court of Claims has made clear, *Turtle Mountain Band of Chippewa Indians v. United States,* 203 Ct. Clm. 426, 454-56 (1974), Congress reserved to itself the final determination as to which modern-day entities belong to the identifiable group, and Congress has the *"exclusive right to extinguish Indian title," id.* at 444. The Court of Claims itself cited the foregoing portions of *Turtle Mountain Chippewa Tribe* when it suggested that the Western Shoshone could go to Congress and delay "the direction necessary to pay." *Western Shoshone Legal Defense & Education Association v. United States,* 531 F.2d 495, 503 n. 16 (1976); *Temoak Bands v. United States,* 593 F.2d 994, 999 (1979). Therefore, it was not irrational for the court of appeals below to hold that payment, with the evident threat of extinguishment, does not occur until Congress decides which modern-day entities are included in the judgment and might thereby be precluded.

In deferring to Congress the Court of Claims was recognizing that only Congress could take the action feared by the Western Shoshones, extinguishment of title through the supposed preclusive effect of payment of the Court of Claims' judgment. The final action of Congress is neither a review of the underlying merits nor a mere routine supervision of the Secretary's handling of Indian trust property, it is the point at which Congress decides the critical matter of which modern-day entities are to share in the award *and* authorizes its distribution. Until those steps are completed, no payment has occurred, the beneficiaries are not known, and there can be neither preclusion under Section 22(a) of the I.C.C.A. nor extinguishment of any surviving title.

CONCLUSION

The Danns respectfully pray that this Court affirm the court of appeals decision on the merits of the discrete facts of this case without speculation as to what effect pending legislation may have on other Western Shoshone lands which are not before the Court.

Respectfully submitted,

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August 20, 1984

APPENDIX

Office - Supreme Court, U S
FILED
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ALEXANDER L. STEVAS
CLERK

No. 83-1476

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

UNITED STATES OF AMERICA,

Petitioners,

vs.

MARY DANN and CARRIE DANN,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' APPENDIX

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DATED August 20, 1984

BEST AVAILABLE COPY

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APPENDIX A

[TREATY OF RUBY VALLEY]

TREATY WITH WESTERN BANDS OF SHOSHONEE INDIANS

Treaty between the United States of America and the Western Bands of Shoshonee Indians. Concluded October 1, 1863; Ratification advised, with amendment, June 26, 1866; Amendment assented to June 17, 1869; Proclaimed October 21, 1869.

ULYSSES S. GRANT, PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

Whereas a Treaty was made and concluded at Ruby Valley, in the Territory of Nevada, on the First day of October, in the year of our Lord one thousand eight hundred and sixty-three, by and between James W. Nye and James Duane Doty, Commissioners, on the part of the United States, and Te-moak, Mo-ho-a, Kirk-weedgwa, To-nag, and other Chiefs, Principal Men, and Warriors of the Western

Bands of the Shoshonee National of Indians, on the part of said bands of Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned Commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE I.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands

stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE II.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States; and of all emigrants and travelers under its authority and protection, without molestation or injury from them. And if depredations are at anytime committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over

either of said routes is hereby guaranties by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country: and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for the mail or telegraph companies.

ARTICLE III.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hinderance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the

employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific Ocean, it is stipulated by said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE IV.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be

erected and timber taken for their use, as also for building or other purposes in any part of the country claimed by said bands.

ARTICLE V.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-bo Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE VI.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and

become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE VII.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceeding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the

said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE VIII.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to _____ thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

s/JAMES W. NYES/
s/JAMES DUANE DOTY

s/TE-MOAK	s/PO-ON-GO-SAH
s/MO-HO-A	s/PAR-A-WOAT-ZE
s/KIRK-WEEDGWA	s/GA-HA-DIER
s/TO-NAG	s/KO-RO-KOUT-ZE
s/TO-SO-WEE-SO-OP	s/POM-GE-MAH
s/SOW-ER-E-GAH	s/BUCK

Witnesses:

J.B. MOORE, Lt. Col. 3d Inf. Cal. Vol.
JACOB T. LOCKHART, Indian Agent Nev. Ter.
HENRY BUTTERFIELD, Interpreter.

And whereas, the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-sixth day of June, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with an amendment, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF

THE UNITED STATES

June 26, 1866

Resolved, (two-thirds of the Senators

present concurring,) That the Senate advise and consent to the ratification of the Treaty of peace and friendship made at Ruby Valley, in the Territory of Nevada, the first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by their Commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, with the following

AMENDMENT:

Fill the blank in the 8th article with the word "five".

Attest:

s/J.W. FORNEY, Secretary

And whereas, the foregoing amendment having been fully explained and interpreted to the undersigned Chiefs, Principal Men, and Warriors of the Western

Bands of the Shoshonee Nation of Indians, they did, on the seventeenth day of June, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendment, in the words and figures following, to wit:

Whereas the Senate of the United States, in executive session, did advise and consent to the ratification of the Treaty of peace and friendship, made at Ruby Valley, in the Territory of Nevada, on the first day of October, one thousand eight hundred and sixty-three, by the Commissioners on the part of the United States and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, with the following amendment:

"Fill the blank in the 8th article with the word 'five'."

And whereas the foregoing amendment has been fully interpreted and explained

to the undersigned Chiefs and Principal Men and Warriors of the aforesaid Western Bands of the Shoshonee Nation of Indians, we do hereby agree and assent to the same.

Done at Ruby Valley, Nevada, on this 17th day of June, A.D. 1869.

s/TIM-OOK
s/BUCK
s/FRANK
s/CHARLEY TIMOOK
s/TO-NAG

ATTEST:

J. H. DAWLEY
R. B. SCOTT
W. R. REYNOLDS
LOUIS GRINNELL, Interpreter

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-sixth of June, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said Treaty, with the amendment as aforesaid.

In testimony whereof, I have hereto signed my name, and have caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-fourth.

[Seal]

s/U.S. GRANT

By the President:
Hamilton Fish,
Secretary of State

APPENDIX B

January 13, 1960

Mr. Clarence Blossom
Battle Mountain,
Nevada

Re: Western Shoshone Litigation

Dear Mr. Blossom:

I have your letter of October 4, 1959, received in this office on January 11, 1960, in which you state that due to deceptive methods used in the Agency called meeting for Western Shoshone Tribe in Elko, Nevada, on August 21, 1959, and unfair and undemocratic procedure and high pressure method employed by Agency and attorneys on Indians of this tribe, you request your name be stricken from the renewal and amendment to the contract as signed by yourself and others at Elko, Nevada on August 21, 1959. You also state that you consider the contract void and

nullified.

First, let me state that you as well as I know that there was no fraudulent or deceptive means used on the Indians, whatsoever. All persons concerned spent a full day prepared and willing to answer any question and furnish all information pertinent to the subject of the meetings at Elko. The Indians were fully informed on the action they were taking.

Everything possible was done to have the Indians fully informed.

As you will recall, the only contention at these meetings was that some of the Indians felt that they should receive land instead of money judgment for their claim. It has been repeatedly explained to all persons who have made inquiries to this effect over a number of years that the Indian Claims Commission Act does not give jurisdiction for the restoration of land or property, but

confines its remedy to a money judgment. Also discussed were certain problems concerning hunting and fishing rights. It was fully and honestly explained that the claims litigation would not affect one way or another the existing hunting and fishing rights of the tribe.

As you perhaps know, the Commissioner of Indian Affairs has already conditionally approved the attorney's contract. Also, you were acting as an authorized delegate of the meeting, and not individually in your own behalf. Under these circumstances, and in other cases, the Commissioner of Indian Affairs has heretofore refused to allow a delegate to withdraw his signature from a contract absent direction by a meeting similarly assembled and similarly authorized for the purpose.

We consider the contract valid and subsisting, and will continue to render

services to the Western Shoshone Indians in accordance with the contract.

Very truly yours,
WILKINSON, CRAGUN & BARKER

s/ROBERT W. BARKER

RWB:bbs
cc: Commissioner of Indian Affairs
Superintendent, Nevada Agency

APPENDIX C

WESTERN SHOSHONE INDIAN NATION

April 24, 1965
Elko, Nevada

INDIANS - FRIENDS and BROTHERS:

We welcome you on behalf of the Western Shoshone and the Paiute and the Washo Tribes who are the sponsors of this meeting and together with our brothers the Hopi and the Navajo, and the Utes and the Indians of California and all the others who have come a long ways. We are glad to be gathered together here for this historic occasion. It is with great difficulty and much sacrifice that some of our Indian people have traveled great distances in order to see and hear for themselves that they might know and report back to their people those things which are said here today, and in order to report back to the people what is correct

and which course is best for the welfare of our people.

We are of the opinion that these matters as the Indian Claims settlements have not been thoroughly discussed, and that all of the facts have not been presented at any of the Bureau of Indian Affairs sponsored meetings where the attorneys involved in these claims were present. In fact there is an open question as to just who these attorneys represent in as much as we Indians of the Western Shoshone Tribe have had nothing to do with the hiring of them. We have on a number of occasions notified these attorneys, Barker and associates of Washington D.C., that they are not working for or representing us. But our protest have been ignored. They continue to deal with Indian agents and the government sponsored tribal councils and they ignore the true chiefs and leaders of the

Shoshone people.

Also when they the Bureau of Indian Affairs and the attorneys have called these meetings they usually call them at a time on a week-day when most of our people are working and cannot be present and with only a few days notice, if any. They also bring in outside Indians who are not members of our tribe and some who work for the Bureau of Indian Affairs with expenses paid, and they use these people to out vote us and to our disadvantage.

And although Bureau of Indian Affairs officials claim that they nothing to do with these meetings we notice that they always arrange the meetings for the attorneys and more often then not some of these B.I.A. officials are also there misadvising the Indians to sell out.

The attorneys have misled the people into believing that they were going to get a lot of money when in fact it will be the

attorneys who will be rich and not the Indians.

They also have asked our people to accept a settlement based on the valuation of the land as of 100 years ago and without interest and many of our people speak no English and do not understand what they are selling.

They, the attorneys have also told our people that they would not be terminated when in fact the records show otherwise for tribes who have already sold out.

The attorneys have also said that our treaty with the U.S. Government is just a scrap of paper and doesn't mean anything although that treaty was signed by chiefs and headsmen of the Western Shoshone Indian Nation and ratified by the Congress of the United States Government. So we know that this is not true.

We know that these tactics are wrong and that there is much being done to our

people at the present time which is not right.

We know that those actions on the part of the U.S. Government as represented by the Bureau of Indian Affairs and together with these attorneys and the U.S. Indian Claims Commission are all in violation of our Treaty of Peace and Friendship which was signed in Ruby Valley, Nevada between the "Western Shoshone Indian Nation" and the United States Government in the year of 1863.

The hereitary [sic] rights of Indians who do not wish to sell out have been grossly ignored by all government officials and attorneys concerned.

I, as the true and hereditary chief of the Western Shoshone Indian Nation am designated by the power of the Great Spirit to hold this land for my people. And I have not hired any attorneys and I have not signed any paper or documents

with anyone giving them the authority to enter into any court action for the purpose of the sale of any part of our lands.

This earth is our Mother and it is not for sale, I have spoken.

s/FRANK TEMOKE, Chief
Western Shoshone Indian Nation

APPENDIX D

OPINION OF GENERAL COUNSEL
GENERAL ACCOUNTING OFFICE

B-179425-O.M.

October 30, 1973

Director, TCD

Returned. Section 322 of the Transportation Act of 1940, as amended in 1972 by Public Law 92-550, 86 Stat. 1163, 49 U.S.C. 66, provides for payment of transportation bills upon presentation,

> ". . . but the right is reserved to the United States Government to deduct the amount of any overcharge by any carrier or forwarder from any amount subsequently found to be due such carrier or forwarder."

Administrative settlement of claims and the collection of overcharges by deduction are limited by the following provisos:

> "That such deductions shall be made within three years (not including any time of war) from the time of payment of bills."

and

> "That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later."

A construing of the term "deductions" in the first proviso to establish the exact point at which deduction action is barred should be consistent with a construction of the term in the second proviso as it limits action by the carrier in the same statute. The operative words limiting carrier and Government action in 49 U.S.C. 66(a) should be construed to achieve the legislative purpose, and according to their usual or ordinary meaning. 51 Am. Jur. 2d, Limitation of Actions, Section 48; cf. 46 Comp. Gen. 223, 227 (1966).

The authority of the General

Accounting Office in this case is to "settle or adjust" claims by the carrier against the United States, 31 U.S.C. 71, and, among other things, to use the method of deductions provided in 49 U.S.C. 66, if applicable. The General Accounting Office does not "pay" amounts it determines upon settlment to be due the carrier; it forwards its certification to the proper disbursing officer for "payment." See 31 U.S.C. 47; 4 CFR 54.10. The legal definition of "payment" is well settled; it requires an actual or constructive transfer of funds. "Payment" is:

> "(1) the discharge of an obligation in whole or in part, (2) by the actual or constructive delivery, (3) of money or its equivalent, such as property, (4) by the obligor or someone for him, (5) to the obligee, (6) for the purpose of extinguishing the obligation in whole or in part, and (7) its acceptance as such by the obligee." 60 Am. Jur. 2d, Payment, Section 1.

The date of payment by check is the date of the check, if it is paid upon due presentment. 70 C.J.S. Payment, Section

24.

Similarly, the General Accounting Office usually does not "deduct" amounts owed by the carrier under 49 U.S.C. 66(a). It determines that the carrier's debt to the overcharged account should be paid from an account on which the Government owes the carrier. However, neither debt, claim nor overcharge, is extinguished until funds are actually or constructively transferred, something which is done by the requisite disbursing officers.

Usually this Office, at the time it determines that an amount is owed the United States and should be deducted, does not know which account, or if any account, will be available for such action. U.S. GAO Form 8002-A, used for this purpose, requests of the disbursing agency that the amount shown "be collected by deduction from a bill(s) of the indicated carrier." It would be contrary to the concept of

deduction as a subtraction of one amount from another to hold that a deduction was made before both amounts were identified.

In this case, our Office determined the existence of both amounts, one owing the carrier, and one owing the United States. However, the process of deduction in this case required a transfer of funds from an account in which the carrier was due funds (here, 57M3400) to an account on which an overcharge had been made (here, 17X3980). Our determination required that transfer; it was not an accomplishment of it.

The purpose of the limitation on the time in which the United States may use the process of deduction was expressed in S. Rept. No. 334, 85th Cong., 1st sess. 5 (1957):

> "The right of the Government to deduct for overpayment is not limited as to time; the Committee believes that a reasonable time limitation should be established for such deductions. It seems unfair that the carriers subject

> to this provision should be subject to deductions for as many years as meets the convenience of the Government. Therefore, the period should be made certain."

The goals of fairness and finality would not be met by allowing this Office to request a deduction by the disbursing agency within the 3-year period, and then allowing the agency to delay identification of an amount from which to effect the deduction, notation on the books of account, and payment of any amount still owing the carrier. The Certificate of Settlement dated February 27, 1973, claim No. TK-947559, certified that $719.88 was due the carrier on Government bill of lading No. D-4345683, carrier's bill No. 32645, but the U.S. Army Finance Support Center did not take deduction action until June 6, 1973. The deduction action authorized on the Certificate of Settlement dated February 27, 1973, claim No. TK-947337, was delayed

until April 16, 1973.

In view thereof, deductions authorized in the first proviso in 49 U.S.C. 66(a) must be made within 3 years from the time of payment of bills [or of supplemental bills--46 Comp. Gen. 223 (1966)] and the time when the deduction is made is the date when the appropriate disbursing officer makes the transfer between the funds to be charged and credited.

Government bill of lading No. F-0554274, on which we found an overcharge of $891.10, was included on carrier bill No. 36018 which was paid on March 13, 1970. On February 27, 1973, we certified on a Certificate of Settlement (claim No. TK-947337) that the carrier was due $719.88 of $799.58 claimed for transportation services furnished on Government bill of lading No. D-4345690, freight bill 32776; we indicated on the certificate that $171.22, part of the

allowable amount, was set off against the overcharge on Government bill of lading No. F-0554274. Since the application or deduction or setoff was not made by the disbursing office until April 16, 1973, or more than 3 years after March 13, 1970, it was too late under 49 U.S.C. 66(a).

Therefore, the $171.22 included in Trans Country Van Lines' claim for $183.72 on supplemental bill No. 32776, April 18, 1973, should be allowed, if otherwise correct. Also, appropriate consideration should be given to the $12.50 shipment charge. See our decision of March 27, 1973, B-177127, which concerns that issue.

s/PAUL G. DEMBLING

General Counsel

Attachments

APPENDIX E

Solicitor - Indian Affairs

Acting Director, Office of Trust Responsibilities - BIA

NOV 12 1975

Land Status, Western Shoshone Indians

Enclosed is a copy of a letter from Mr. Tom Delehanty, Jr., Lynbrook, New York forwarded to us for consideration by Senator James Buckley.

Mr. Delehanty refers to the Treaty of 1863 with the Western Shoshone and alleges that the land was never taken legally by the United States, so therefore the land is still theirs. Also they have the right to hunt on the lands referred to.

Our review of the treaty and Executive Orders indicates that Mr. Delehanty is correct. It is requested that a review of the matter be conducted by your office to determine land ownership and the hunting and fishing rights of the Western Shoshone

Indians.

Your prompt attention to this matter will be appreciated.

s/WILLIAM L. BENJAMIN

Enclosure

APPENDIX F

RESOLUTION OF THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA

WHEREAS, the Indian Claims Commission and the United States Court of Claims have determined that the Temoak Bands of Western Shoshone Indians of Nevada is the exclusive representative having authority to maintain the claim, designated Docket No. 326-K, on behalf of the Western Shoshone Identifiable Group before the Indian Claims Commission; and,

WHEREAS, the United States Court of Claims has held that the Temoak Bands of Western Shoshone Indians of Nevada made a decision to give up claim of title to lands included within the subject matter of the claim as a matter of litigation strategy; and,

WHEREAS, the Temoak Bands of Western Shoshone Indians of Nevada was never

presented the opportunity to choose between including lands in the claim and attempting to assert title to said lands, and, hence, never made a decision between these alternative remedies; and,

WHEREAS, the Temoak Bands of Western Shoshone Indians of Nevada is the political representative of only a portion of the Western Shoshone People included within the Western Shoshone Identifiable Group and cannot speak for those Western Shoshone Indians who do not come under the political jurisdiction of the Temoak Bands nor take any action effecting title to lands belonging to the Western Shoshone Identifiable Group as a whole; and,

WHEREAS, in 1965, the Temoak Bands of Western Shoshone Indians of Nevada informed the Attorney for the Western Shoshone Identifiable Group that the Temoak Bands could not take action binding upon the remainder of the Identifiable

Group and the Attorney for the Western Shoshone Identifiable Group has continued to prosecute the claim before the Indian Claims Commission in the name of the Temoak Bands of Western Shoshone Indians of Nevada, causing confusion in the Indian Claims Commission and among the Western Shoshone Indians; and,

WHEREAS, the United States Court of Claims has found that the continuing existence of title in the Western Shoshone Identifiable Group to large portions of lands included within the claim is an open question which could be decided either way and that question is now before the United States District Court for Nevada; and,

WHEREAS, if the claim proceeds to judgment, Western Shoshone Indians will be prevented by law from asserting claim of title to any lands which are the subject matter of the claim; and,

WHEREAS, it appears that substantial

portions of the lands included within the claim may actually belong to the Western Shoshone Identifiable Group and have been mistakenly placed under the jurisdiction of the Bureau of Land Management and the Department of Agriculture: and such mistake may be corrected by administrative action: and,

WHEREAS, the Business Council of the Temoak Bands of Western Shoshone Indians of Nevada has a moral and constitutional duty to protect lands belonging to the Western Shoshone Indians,

NOW, THEREFORE, BE IT RESOLVED BY THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS:

1. That the Chairman is directed to file with the Indian Claims Commission a motion to stay the proceedings in Docket No. 326-K until a proper representative entity has been designated which can make decisions on behalf of the Identifiable

Group and properly receive any judgment, and, until the question of title before the United State District Court of Nevada and the administrative action to transfer lands from the Bureau of Land Management and Department of Agriculture have been resolved. The Chairman shall attach a copy of this resolution to the motion.

2. That the United Western Shoshone Legal Defense and Education Association is authorized to bring and maintain, in the name of the Temoak Bands of Western Shoshone Indians of Nevada, administrative actions requesting transfer of lands belonging to the Western Shoshone Indians and mistakenly under the jurisdiction of the Bureau of Land Management and/or the Department of Agriculture to the Bureau of Indian Affairs.

s/MARVIN McDADE

s/EDWARD McDADE

s/LESLIE BLOSSOM

CERTIFICATION

I HEREBY CERTIFY that the Resolution set forth above was adopted by the Business Council of the Temoak Bands of Western Shoshone Indians of Nevada at a meeting at Elko, Nevada, on the 10th day of November, 1976, at which a quorum was present, and by a vote of three (3) for and two (2) against.

s/DORA SCAMILLA
Secretary, Business Council of the Temoak Bands of Western Shoshone Indians of Nevada

APPENDIX G

RESOLUTION OF THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA

WHEREAS, representatives of the Western Shoshone People originally retained the predecessors of the current claims lawyers for the express purpose of enforcing their rights under the Treaty of Ruby Valley; and, the current claims lawyers and their predecessors have failed and refused to enforce these rights and have derrogated said Treaty of Ruby Valley; and,

WHEREAS, Robert W. Barker, Donald C. Gormley, the firm of Wilkinson, Cragun and Barker have failed to protect the property interests of the Western Shoshone People; and,

WHEREAS, said attorneys have failed to explain to the Western Shoshone People the full consequences of actions taken by

said attorneys on behalf of the Western Shoshone Identifiable Group; and

WHEREAS, said attorneys have been unresponsive to the requests made by members of the Western Shoshone Identifiable Group; and,

WHEREAS, said attorneys have placed themselves in a position where their actions on behalf of the Western Shoshone Identifiable Group cannot be effectively controlled by the members of the Identifiable Group; and,

WHEREAS, there appears to be a conflict of interests between said attorneys who appear to be interested only in maximizing the amount of the claim before the Indian Claims Commission and the Western Shoshone People who desire to preserve as far as possible their aboriginal and treaty rights to their sacred ancestral lands; and,

WHEREAS, the Temoak Bands of Western

Shoshone Indians, Nevada, has been held by the Indian Claims Commission and the Court of Claims to be the exclusive representative of the Western Shoshone Identifiable Group in prosecuting the claim of the Identifiable Group before the Indian Claims Commission and, as such, has a responsibility to insure that the interests of the Western Shoshone People are not jeopardized; and,

WHEREAS, in the opinion of the Business Council of the Temoak Bands, said attorneys have lost the confidence of the Westen Shoshone People; and,

WHEREAS, it is of the greatest importance that the legal representatives of the Western Shoshone Identifiable Group be lawyers who have the confidence of the Western Shoshone and can be relied upon to represent the interests of the Western Shoshone People as these People believe them to be; and,

WHEREAS, no organized and politically responsive entity is known to the Business Council of The Temoak Bands which is capable of acting as exclusive representative of the Western Shoshone Identifiable Group and therefore the Temoak Bands, in view of its expanding political jurisdiction [sic], should remain as exclusive representative for the Western Shoshone Identifiable Group until such time as a broader based Indian Reorganization Act Government is formed and designated as exclusive representative for the Identifiable Group:

NOW, THEREFORE, BE IT RESOLVED BY THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA:

1. That any contract which may exist between the Temoak Bands of Western Shoshone Indians, Nevada, and/or The Western Shoshone Identifiable Group and Robert W. Barker, Wilkinson, Cragun and

Barker, and any associates thereof, is hereby terminated.

2. That the Chairman is assigned the responsibility of locating prospective replacement counsel and reporting his findings to this council.

3. That the Chairman petition the Secretary of the Interior explaining our plight and requesting assistance in replacing counsel before the Indian Claims Commission and to intervene in the Claim Docket 326-K pending there to protect the interests of the Western Shoshone Identifiable Group.

4. That the Chairman file a document in the Indian Claims Commission discharging Robert W. Barker, Donald C. Gormley and the firm of Wilkinson, Cragun and Barker as counsel for The Temoak Bands of Western Shoshone Indians, Nevada, and The Western Shoshone Identifiable Group and requesting a stay of proceedings until

such time as replacement counsel can enter an appearance.

5. That the Chairman supplement paragraph 1 of the Motion to Stay Proceedings dated November 11, 1976 requesting that The Temoak Bands remain as exclusive representative of the Identifiable Group until such time as a broader based Indian Reorganization Act Government can be formed.

s/EDWARD McDADE

s/MAXINE McDADE

s/LESLIE BLOSSOM

CERTIFICATION

I HEREBY CERTIFY that the Resolution set forth above was adopted by the Business Council of The Temoak Bands of Western Shoshone Indians of Nevada at a meeting at South Fork, Nevada, on the 14th day of November, 1976, at which a quorum

was present, and by a vote of three (3) for and two (2) against.

s/MAXINE McDADE
SECRETARY, Business Council
of The Temoak Bands of Western
Shoshone Indians of Nevada

APPENDIX H

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Solicitor
Washington, D.C. 20240

OCT 12, 1977

Memorandum

To: Acting Assistant Secretary,
Indian Affairs

From: Associate Solicitor,
Indian Affairs

Subject: Western Shoshone Claim, Indian Claims Commission, Docket 326-K--Effect of Commissions Decision On Petition to Secretary to Restore Land to Western Shoshone

On August 15, 1977, the Indian Claims Commission ruled against various motions to stay proceedings and made a final award in Docket 326-K. The motions to stay would have prevented entry of final judgment in the Western Shoshone claim against the United States and thereby postponed the time at which Congress would appropriate funds to pay the claims award.

Payment, according to 25 U.S.C. Section 70u, would bar any further claim concerning the matter against the United States.

The essence of the Commission's opinion is that, "it is too late in the litigation for the Commission to be asked to stay proceedings in order to permit the adjudication of the case on a new theory . . .." Western Shoshone v. U.S., Docket 326-K, 40 Ind. Cl. Comm. 305, 308.

The Temoak Bands of Western Shoshone sought the stay of proceedings in order to pursue an administrative remedy in the Department. A petition to the Secretary, dated February 22, 1977, on behalf of the Western Shoshone is now before the Department. The petition seeks the restoration of certain lands described in the 1863 Treaty of Ruby Valley. On May 11, 1977, this Office advised the petitioners that the Department would not

decide whether to consider the claim raised by the petition until further proceedings in the Indian Claims Commission were stayed.

Although the legal claim of the Shoshone is, in my opinion, substantial, the present posture of the case makes it extremely difficult procedurally for them to pursue the claim in court. The record in the case reveals that no party to the suit has taken an appeal to the Court of Claims yet. Each has until November 15, 1977, to make that decision. The prospects for successful appeal of the denial of the motions to stay are dim because of the discretionary nature of the ruling. If no appeal is taken, the Indian Claims Commission will report its decision to Congress for payment. Report of the final determination against the motions for stay will be a bar to any further claim arising out of the controversy. 25

U.S.C. Section 70u(b). Thus, should the Secretary agree to review the Shoshone's administrative petition, the time in which to complete his review will be limited by the date on which the Indian Claims Commission reports its decision to Congress. Clearly, that would leave too little time to conduct an effective review. To insure sufficient time to review (absent an appeal), it would be necessary for the Shoshone and the Department to support special legislation to prevent Section 70u(b) from nullifying administrative review of the petition.

This Office has received three letters in the past month concerning the Western Shoshone claim. Two were from Reid Chambers, Esq., who serves as counsel to the Temoak Bands of Western Shoshone under special contract approved by the

Department.1/ In his letter of August 11, written after oral argument of the motions to stay proceedings on July 18, Mr. Chambers asked that this office reconsider its May 11 decision to wait until the Claims Commission ruled on the motions to stay proceedings before deciding whether to consider the petition. His request was based on the Commission's views that the Department's consideration of the petition would not interfere with the Commission's jurisdiction. However, four days later, on August 15, the Commission entered its opinion denying the stay and making final disposition of the claim by awarding the Shoshone approximately $26 million in damages. Mr. Chambers then wrote on

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1/ Robert W. Barker, Esq., is the attorney of record for the Shoshone in Docket 326-K. The Temoak Bands, who are the representative plaintiff in the claim, notified the Department on January 19, 1977, that Mr. Barker's claims attorney contract had abeen terminated.

August 18, advising the Department of the Commission's decision and asking that the Department defer any decision on the petition or the August 11 letter until he had an opportunity to consult with the Temoak Bands Business Council.

A third letter, dated August 29, 1977, was received from the Western Shoshone Legal Defense and Education Association. The Association questions the conduct of the Western Shoshone claim, particularly because the claim as structured precludes the recovery of lands by the tribe.

Among the Western Shoshone there are groups who have persisted in their efforts to recover a substantial land base ever since their claim was first conceived in the 1920's. The Shoshone are impecunious and, consistent with their aboriginal social structure, without a strong central leadership. As a result, although the Shoshone who assert that their title to

land is intact may be in the majority, it is those seeking damages who are accommodated by the structure of the Indian Claims Commission Act. The Act assumes that Indian title is extinguished and provides for money damages as exclusive remedy for claimants. 2/

It is my opinion that, even at this stage in the Claims Commission proceedings, the Secretary has the prerogative to review the petition. His examination of the Shoshone claim

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2/ Mr. Chambers suggests that a recent amendment to the Administrative Procedures Act by P.L. 94-574 effects a partial waiver of sovereign immunity by the Government. The amendment confers jurisdiction on federal courts to grant relief other than money damages for unlawful administrative action. Heretofore, states Mr. Chambers, there was no such remedy available to the Shoshone. Their only alternative was to make a damage claim for loss of title to the Indian Claims Commission. This change in the law may belie the finding of the Commission that it is too late for the Shoshone to revise the theory of their claim.

would not be constrained by a presumption that Shoshone title to the land in question was extinguished. In fact, the Secretary could find that title to some of the lands described in the Treaty of Ruby Valley remains in the Western Shoshone Indians. But it is also within the Secretary's discretion to decide against reviewing the petition. Either alternative raises important questions about the Department's policy toward Indian land claims. Therefore, I suggest reviewing this matter with you and counsel for the Western Shoshone before making a recommendation to the Secretary about disposition of the Shoshone petition.

(initialed: s/TWF)

APPENDIX I

AFFIDAVIT OF RAYMOND YOWELL

RAYMOND YOWELL, being first duly sworn and upon oath, deposes and states as follows:

1. I am a member of the Western Bands of Shoshone Indians, referred to by the Indian Claims Commission as the Western Shoshone Identifiable Group, whose claim is currently before the Court of Claims on Appellants' Motion for Rehearing, Appeal Docket No. 3-75.

2. Since the early 1960s, I have been involved in the political affairs of the Western Shoshone people. I am a former Chairman and member of the Temoak Bands Business Council and the immediate past Chairman of the Inter-Tribal Council of Nevada. From 1965 until the present time, I have served as a member of the Western Shoshone Claims Committee.

3. Although I did not personally become involved in the Western Shoshone claims proceedings until around 1965, both my father and my grandfather attended the meetings concerning the Western Shoshone claims that were held prior to that time. They always told me that the attorneys representing our people before the Indian Claims Commission advised and told the people that there was no alternative to pursuing a claim for compensation for our lands before the Commission.

4. After the Indian Claims Commission's decision in 1962, that the aboriginal title of the Western Shoshone to their lands in Nevada had been extinguished by the gradual encroachment of settlers, it apparently became necessary for the claims attorneys to hire experts to appraise the value of the lands in 1872.

5. In 1965, Mr. Robert Barker

contacted the Temoak Business Council of which I was a member, and requested the Council to approve the application for a government loan to finance the appraisal of Western Shoshone lands. Subsequently, we informed Mr. Barker that as members of a Council which represented only the people of the South Fork area, we could not approve the loan application because we felt that all of our people should be consulted and decide on the matter.

6. Shortly after the Temoak Business Council's refusal to approve the loan application for the land appraisal, Mr. Barker called a general meeting of all the Western Shoshone in July of 1965. After some discussion concerning whether or not the people wanted the claim to proceed, a majority of the Western Shoshone in attendance at the meeting walked out in opposition to the claims proceedings - they did not agree with Mr. Barker that

the Treaty of Ruby Valley of 1863 did not recognize their ownership in the lands they originally occupied and they did not agree that the U.S. Government had taken title to their lands.

7. After the majority of people walked out of the 1965 mass meeting, myself and a few others remained. We advised Mr. Barker that representatives from many of the areas where the Western Shoshone live were not present, and that in order to get the views of all the people, he would have to conduct mass meetings in several areas throughout the State of Nevada.

8. Subsequent to the mass meeting in Elko, Nevada, four area meetings were held at Austin, Ely, Owyhee, and again at Elko, Nevada. At the Elko area meeting which I attended, about 80% of the Western Shoshone present again walked out in opposition to the claim. Mr. Barker

instructed the 20 or 30 of us who remained to vote on whether or not the claim should be prosecuted and to elect representatives. I was elected as the r presentative from the South Fork Indian Reservation and Jackie Woods was elected to be the representative of the Elko area. During this vote, no precautions were utilized to determine whether a majority of people from the areas for whom representatives were chosen were present, the eligibility of voters, or to prevent people from voting more than once.

9. About two weeks after the Elko area meeting, the Claims Committe held its first official meeting. The Committee consisted of: LeRoy Brady, representing the Yomba Reservation; Jackie Woods, representing Elko area; Willis Premo and Arthur Manning, representing Owyhee area; William McQueen, representing the Ely area; Raymond Graham, representing the

Duckwater area; Emmit Rosse, representing the Austin area; and myself, representing the South Fork area.

10. At the first meeting of the Claims Committee, Mr. Barker requested the Committee to sign the application for the appraisal loan, which the Committee did approve and sign. Mr. LeRoy Bracy walked out of the Claims Committee meeting, stating that he did not approve of Mr. Barker running the meeting.

11. Although the members of the Claims Committee were not employed by Mr. Barker's law firm, it is my belief that the members of the Committee viewed it as their role to assist Mr. Barker in the claims proceedings. Mr. Barker never asked the Committee to make any decisions concerning the handling of the claims but only to formally approve the decisions made by his law firm. The Claims Committee never met independently of Mr.

Barker until after the Western Shoshone Legal Defense and Education Association and Frank Temoke filed their Petition to amend the Western Shoshone claim. The Committee has never had any by-laws or formal rules of procedure and the members of the Committee were not elected to serve for any specific period of time.

12. In the Spring of 1973, the Claims Committee attempted to instruct the claims attorneys to remove certain lands from the claim so that they could be retained as grazing lands. Ms. Francis Horn, one of the attorneys of the Wilkinson, Cragun and Barker law firm informed us that this was impossible and that the attorneys would not even consider this proposed course of action.

13. In a meeting of the Claims Committee held on June 16, 1974, in Elko, Nevada, members of the Western Shoshone Legal Defense and Education Association

were present. An attorney for the Association explained to the Committee that the Association took the position that the Western Shoshone still retained aboriginal and/or treaty title to their lands in Nevada and were prepared to litigate the validity of their title in courts of law. Mr. Glenn V. Holley, Sr., President of the Association, requested the Claims Committee to instruct Mr. Barker's law firm not to oppose the efforts of the Association to intervene in the proceedings before the Indian Claims Commission. At that time, Mr. Barker's partner, who was also at the meeting, informed the Committee that even if the Committee voted to support the Association, his law firm would have to proceed with the claim and oppose the Association's attempt to intervene because of his firm's obligation to the Indian Claims Commission.

14. After some debate on the matter of whether or not the Committee should endorse the position and efforts of the Association in the claims proceedings, the Claims Committee voted to support both the Association and the claims attorneys in their respective courses of action. I thought it was self-defeating for the Claims Committee to support the contradictory positions and actions of both groups and attempted to get the Committee to delay taking final action on the matter until we had consulted with our people in the various areas of the State.

15. During the summer of 1974, the Claims Committee sponsored meetings in several areas of Nevada to inform the Western Shoshone people regarding the position and actions of the Western Shoshone Legal Defense and Education Association in regard to the claims proceedings. Although the Committee

specifically invited and requested Mr. Barker or his representative to attend these meetings and explain to the people why they were opposing the efforts of the Association to intervene in the claims proceedings. Mr. Barker informed the Committee that he was too busy to attend the meetings.

16. I am advised that Mr. Arthur Manning, Chairman of the Claims Committee, has represented in an Affidavit to the Court of Claims, appended to the Brief of the Western Shoshone Identifiable Group On Issue of Collusion, that, in his opinion, the vast majority of the Western Shoshone people understand and overwhelmingly favor the prosecution of the claims. I strongly disagree with Mr. Manning on these issues. I believe that most of our people do not understand the claims proceedings or that our people will be forever barred from testing our treaty title to the lands in

question once the proceedings before the Indian Claims Commission are completed and a judgment awarded. Furthermore, I believe that our people who now support the claims have always been given to understand by the claims attorneys that their treaty was worthless and that there was no alternative to making a claim for compensation for our lands before the Indian Claims Commission.

17. Our native religion teaches us that our ancestors' lands are sacred to our people. I believe that many if not the majority of our people would prefer to try to retain our native lands if that were possible, rather than to concede the title to our lands before the Indian Claims Commission. However, as a matter of fact, our people have never been accorded the opportunity to make that decision.

s/RAYMOND YOWELL

Subscribed and sworn to this 2nd day of March, 1976.

s/JACQUELYNN A. GARRA
Notary Public, Nevada

My Commission Expires:

August 1, 1979

APPENDIX J

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

In Reply Refer To:
Tribal Government Services

MAR 11 1980

Memorandum

To: Phoenix Area Director
Sacramento Area Director

From: Commissioner of Indian Affairs

Subject: Results of Research Report on Western Shoshone Award in Docket 326-K

The subject material is herewith submitted to you in compliance with the Indian Judgment Funds Act of October 19, 1973, 87 Stat. 466, as implemented by 25 CFR, Part 60.

A. BACKGROUND OF THE AWARD

On August 15, 1977, the Indian Claims Commission granted a final award of

$26,145,189.89 in Docket 326-K to the Western Shoshone Identifiable Group as represented by the Temoak Bands of Western Shoshone Indians, Nevada. Litigation and other actions initiated by some Western Shoshone entities, including the Temoak (Te-Moak) Bands, discussed below, delayed until December 19, 1979, the appropriation of funds to satisfy the award.

The Commission concluded that the Western Shoshone Identifiable Group aboriginally exclusively used and occupied a large tract of land located principally in Nevada with a small portion extending into California. The tract formed roughly a wedge from near the northeast corner of Nevada extending south, southwest, with the point of the wedge in California, including Death Valley. It should be noted early in this report that the award does not derive essentially from the Western Shoshone Treaty of October 1,

1863, signed at Ruby Valley, Nevada. That treaty described only the northern portion of the Western Shoshone lands, was not a treaty of cession nor was it intended to be, and neither the Nevada nor the California lands were taken in 1863 (nor were they taken June 26, 1866, when the treaty was ratified or October 21, 1869, when proclaimed).

The Commission found that the Western Shoshone California lands were acquired by the United States by statute on March 3, 1853, and that Indian title to the Nevada lands was extinguished gradually by the United States which treated the tract as public lands. On February 11, 1966, the Commission approved a joint stipulation between the United States and the Western Shoshone plaintiff establishing July 1, 1872, as the aggregate valuation date for the encroachment upon and taking of the Nevada lands. On August 16, 1967, the

Commission severed the Western Shoshone claim from the other claims of the constituent bands or subdivisions of the Shoshone Nation as originally filed in Dockets 326 and 367. The Western Shoshone land valuation claim was designated 326-K.

Prior to the agreement on the Nevada evaluation date the Commission had established that the Nevada tract consisted of 22,211,753 acres and that in California of 2,184,650 acres. On October 11, 1972, the Commission awarded in an Interlocutory Order $21,350,000 for the Nevada land, $200,000 for the California land, and $4,604,600 for the removal of minerals from the Nevada tract prior to the 1872 taking date. The Commission deducted $9,410.11 as payment on the claim, but nothing for offsets, resulting in the 1977 award of $26,145,189.89.

Pertinent Aspects of the Litigation

For many years, a significant element

among the Western Shoshone people, principally those associated with the North Central Nevada area, has maintained that most of the Nevada tract was never ceded or taken. These Shoshone people, coalescing to a large extent around the Battle Mountain Colony, viewed with apprehension the progress of the Western Shoshone claim believing that the granting of an award would deprive all Western Shoshone of the land itself or at least jeopardize their claim to such land. In addition to employing arguments of a legal nature, principally deriving from their interpretation and evaluation of the above-cited Ruby Vally Treaty, the Shoshone element asserting retention or return of the Nevada lands characterized itself as "traditional" and expressed neo nationalist and religious sentiments to the effect that they could not "sell" the land in question. The acceptance of an

award, in fact the award itself, is genuinely regarded by these people to constitute a sale of their lands. They will not accept the decisions of the Indian Claims Commission and the Court of Claims that the Nevada lands were all taken by 1872.

Although these views have been held at least throughout the litigation period which commenced in 1951 with the filing of the claim, it was not until April 8, 1974, that formal action was taken. On that date a petition was filed with the Commission by the Western Shoshone Legal Defense and Education Association, and Frank Temoke, a group primarily, but by no means entirely, associated with Battle Mountain Colony. Frank Temoke, the named individual petitioner, is a descendant of Te-Moak who was one of the signatories of the Ruby Valley Treaty and a Western Shoshone leader during the

Shoshone-American hostilities of the 1850's and early 60's.

The petition to intervene was filed prior to the settlement of the offsets phase of the claim and sought a stay of the proceedings and leave to present an amended claim. The petition was denied by the Commission on February 20, 1975, an appeal to the Court of Claims was denied on February 18, 1976, and the Supreme Court on October 12, 1976, denied the request of the Association that it be allowed to intervene.

It is interesting that the Western Shoshone Legal Defense and Education Association during the course of its efforts questioned the propriety of the Temoak Bands in representing the Western Shoshone Identifiable Group. In its February 18, 1976, decision the Court of Claims noted that appellants maintained that they did not belong to the Temoak

Bands. However, it was precisely the governing body of the organized Temoak Bands which continued the protest and legal actions initiated by the Legal Defense and Education Association, the members of the Association by that time having become politically persuasive within the Temoak Bands.

The original claim before the Indian Claims Commission, filed with all other Shoshone claims, was in the subject case in the name of the "Western Bands of the Shoshone Nation of Indians, represented by the Te-Moak Bands of Western Shoshone Indinas, Nevada, etc." Plaintiffs were later designated by the Commission as the Western Shoshone Identifiable Group [as distinct from other Shoshone], represented by the Temoak Bands of Western Shoshone Indians, Nevada." The Commission, in its opinion of October 16, 1962, stated that the Temoak Bands "has the right to

maintain this action for and on behalf of the descendants of the Western Shoshone identifiable group".

The "Te-Moak Bands of Western Shoshone Indians, Nevada", is organized under an Indian Reorganization Act constitution and bylaws approved August 24, 1938. The entity, orginating [sic] with Elko Colony, now comprises also Battle Mountain Colony, South Fork Reservation (including the practically uninhabited Ruby Valley Reservation and Odgers Ranch), and recently included the newly recognized Wells Colony which now has a tract held in trust.

The Temoak Bands appealed to the Indian Claims Commission from the final award of August 15, 1977. Earlier, like the Legal Defense and Education Association, the Bands had filed a motion to stay the proceedings. Essentially, the Bands sought a delay pending resolution of

a claim in behalf of all Western Shoshone Indians before the Department of the Interior to ownership of lands in Nevada which the Commission had found were taken. Early in these proceedings serious controversy arose around the question of which entity properly represented the Western Shoshone before the Indian Claims Commission. Specifically, the question was whether the Temoak Bands or the Western Shoshone Claims Committee had the capacity to pursue the case and accept or reject a monetary award.

The Temoak Bands, continuing to assert their representation of the total Western Shoshone entity, attempted to terminate the contract of the Attorney of Record who had been representing them since the filing of the Western Shoshone claim in 1951. The Temoak Bands employed different counsel to pursue the land restoration issues with the courts and the Interior

Department. The Western Shoshone Claims Committee, however, was anxious to achieve a monetary award and saw little merit in the Temoak position. This Claims Committee was formed in 1965 by the Western Shoshone General Council. It has been maintained, in fact, that the Western Shoshone General Council initiated the claim with the Indian Claims Commission and that any authority the Temoak Bands had as a recognized representative of the Western Shoshone derived from the General Council. Further, it is maintained that as of General Council meetings held in 1965 the Claims Committee had sole authority to act on behalf of the Western Shoshone in claims matters.

The appeal of the Temoak Bands from the Judgment of the Indian Claims Commission was made over the protests of the Western Shoshone General Council, the Western Shoshone Tribe of Nevada

(incorporated in Nevada), the Claims Committee and the great majority of the Western Shoshone people. On February 21, 1979, the Court of Claims decided the appeal and affirmed the judgment of the Commission. The Temoak Bands applied to the Supreme Court for a writ of certiorari and simultaneously continued to seek the return of lands, or confirmation of what they regard to be ownership of the Nevada lands, from the Department of the Interior. The Department decided not to act on the matter and on November 26, 1979, the Supreme Court denied the request for certiorari. Covering funds, as stated earlier, were appropriated on December 19, 1979. Under the mandate of the 1973 Indian Judgment Funds Act we are, therefore, proceeding with the development of a Secretarial Plan or legislation for the disposition of the award. These processes must begin although we are aware

of the bitter disappointment of those members of the Temoak Bands, and other Western Shoshone, who continue to assert ownership of the lands. We are aware also that the Dann case, involving Western Shoshone who are occupying federal grazing lands in Nevada which they hold to be theirs by virtue of the Ruby Valley Treaty, is pending. Other controversy exists in Nevada around Indian sentiments about proposed nuclear missile sites which are considered to be violative of the Ruby Valley Treaty and religious beliefs. Further protest is expected from a group which now refers to itself as the Western Shoshone Sacred Lands Association.

B. PERTINENT BACKGROUND OF THE SHOSHONE CLAIMS

The Shoshone (Shoshoni), who call themselves Newe (or variants thereof, meaning "people"), are within the Shoshonean linguistic stock which includes

neighbors such as Northern Paiutes, Southern Paiutes and Utes. Linguistically and culturally the Shoshone exhibited remarkable similarities extending from their California territory through Nevada to portions of Idaho, Utah and Wyoming, which areas they occupied during the signing of the five "Doty Treaties" in 1863. Often called "Snakes", particularly as applied to the northern divisions, they were frequently confused with other peoples who were loosely known by the same name. Theoretically, and often in actual fact, Shoshones particularly if mounted, could use any portion of the vast Shoshone territory. Essentially, and especially in the case of the Shoshone who remained in the Nevada-California area (the "Western Shoshone"), they retained the simple gathering and hunting culture, with very loose political organization, of the Great Basin. Those Shoshone who moved well east

of the area to the Southern Plains became Comanche and are not involved in Shoshone claims. The so-called Eastern or Northern Bands, such as those who came under the strong influence of the noted chief Washakie, became Plains-like in many respects, but it should be emphasized that a Shoshone network, strongly Great Basin in nature, extended throughout Shoshone territory. A number of historical and ethnological sources make clear that a Shoshone, once mounted, became a "Shoshoni", and once dismounted, even for a very temporary period, was called a "Shoshoko" or "Walker". The origin of both Indian terms is, however, apparently non-Shoshone. In the most general sense, the picture that emerges is that most Shoshone, including those associated strongly with a buffalo hunting economy, derived from the simpler gathering groups. Seasonal hunting and gathering,

intermarriage, common language and cultural origins, the horse and the ability to travel freely throughout the total Shoshone area all contributed to the fluidity of the Shoshone subdivisions.

Problems in Shoshone Designations

The five Shoshone treaties of 1863, which were negotiated on behalf of the United States by Utah Territorial Governor James D. Doty and others, are instructive regarding political and territorial designations found among the Shoshones or recognized as such by the Government. However, those treaties were by no means all inclusive. Some Shoshone entities, such as the Lemhi Band in itself, were not treated with at that time and the more southerly Western Shoshone were not involved and neither were their lands described.

The first of these 1863 treaties was made on July 2 with the Eastern Bands led

by Washakie, Wanapitz and others, at Fort Bridger, Wyoming (then with Utah Territory). The boundaries of the Eastern Bands were described in terms of the mountains north of the north side of the Snake River Vally (Idaho), by the Wind River Mountains and vicinity on the east (Wyoming), and by the Yampah River and Uintah Mountains on the south (Utah and Colorado). The western boundary was deliberately left undefined because there were "no Shoshones from that district of country present." The bands present claimed that their "<u>own country</u>" was bounded on the west by Salt Lake (emphasis added).

On July 30 a treaty was made with the Northwestern Bands, represented by the chiefs Pocatello and Sanpitz, and others, at Box Elder, Utah. They agreed to the provisions of the Eastern Bands treaty and described their western boundary as the

Ratt River (which flows from Utah north to the Snake River in Idaho) and their eastern boundary as the Portneuf Mountains in southeastern Idaho. A treaty with the Mixed Bands of Bannocks and Shoshones was concluded at Soda Springs in southeastern Idaho on October 14. This group agreed to the aforementioned Eastern and Northwestern treaties and claimed lands, jointly with the "Shoshone nation", extending from the "lower part of Humboldt River (north central Nevada) and the Salmon Falls, on Shoshonee River (Idaho) to the Wind River mountains (Wyoming)." The Bannocks were Northern Paiutes who had become so intermingled and intermarried with Shoshones as to be often indistinguishable from them. They were principally associated with the so-called Mixed Bands and with the Lemhi Shoshone.

Prior to the making of the Mixed Bands Treaty, Governor Doty and the other

commissioners treated with the "Western Bands of the Shoshonee Nation," which treaty of October 1 has previously been noted, and the "Shoshonee-Goship Bands" or Goshute. The Goshute, as described by Great Basin anthropological authorities Omer Stewart and Julian Steward, and a number of others, were unquestionably Western Shoshone, being distinguished only in that they inhabited the most isolated and inhospitable portion of the Shoshone Territory. The Tuilla Valley Goshute Treaty of October 12 placed their territory in western Utah and eastern Nevada, south of Salt Lake and south of the Northwestern Band territory and east of the territory of the Western Shoshone described in the Ruby Valley Treaty.

In very general terms the Indian Claims Commission's findings in the Shoshone cases followed the Doty treaty lines. The Lemhi Shoshone, comprised of

Sheepeater Shoshone, other Shoshone and Bannocks occupied the area north of the Doty line from the headwaters of the Yellowstone westward into Idaho. We have seen that the most southerly Western Shoshone country was also outside the Doty line. The western Idaho Boise and Bruneau Shoshone country was not included in the claim because of the uncertainty of exclusive Shoshone use and occupancy.

Development and Disposition of Shoshone Awards

Petitioners, in the original Docket 326 claim, had asserted the existence of a single Shoshone aboriginal land-owning entity. Indeed, even culturally, particularly as concerns seed gathering, root digging and fishing economies with the attendant techniques, Shoshones throughout often exhibited marked similarities. Subsequent to the Doty treaties federal officials continued in

the last century to report on and describe the Shoshone as one tribe or nation. Anthropologist E. Adamson Hoebel joined other experts like Stewart and Steward in describing Shoshone buffalo hunters exploiting also seed, small game and other resources of the country; and that, although various bands and other much smaller groups identified with particular territories, nothing precluded them from traveling great distances, including on foot, to exploit the resources of other parts of the Shoshone lands. A given Shoshone band received other Shoshone's guests. Omer Stewart found that after the acquisition of the horse the close Shoshone relationship was so extended that Shoshone buffalo hunters appeared as far west in Nevada as Ruby Valley.

In its Interlocutory Order of October 16, 1962, the Commission concluded that there was not one Shoshone land-holding

entity, but four such entities, each of which held Indian title to a separate and distinct area of land. These tribes and identifiable groups were the Shoshone Tribe (the Eastern, Northwestern and Mixed Bands of Shoshones and Bannocks), the Lemhi Shoshone Tribe, the Goshute and the Western Shoshone. The Commission concluded that the Shoshone Tribe exclusively used and occupied the Wyoming lands, the portion of Idaho, including the Snake River country, south of the Lemhi lands, the Great Salt Lake Utah area contigious [sic] to and north of the Goshute portion of Utah, and the northeast corner of Nevada contiguous to the Western Shoshone lands. The Commission assigned the Salmon River area and other portions of Idaho north of the Shoshone Tribe's territory to the Lemhi Shoshone. The northwest Utah and northeastern Nevada Shoshone lands were assigned to the

Goshute, and the rest of the Shoshone lands in Nevada, and the California tract, were assigned to the Western Shoshone.

The other three Shoshone awards were granted prior to that of the Western Shoshone. The disposition of those awards is pertinent to the handling of the Western Shoshone award.

The Shoshone Tribe (Dockets 326-D, E, F, G, H 366 and 367)

This award of $15,700,000 was the subject of the Act of December 18, 1971, 85 Stat. 737. The division of the award was complex, being based on agreements reached by the attorneys for the Shoshone Tribe of the Wind River Reservation, Wyoming, the Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho, and the Northwestern Band of Shoshone Indians. Further, the Wind River and Fort Hall Tribes had developed a 1965 agreement between themselves for the division of the

award. In rough terms the Act provides for $500,000 for the Fort Hall Tribes, $1,375,000 for the Northwestern Bands, and the remainder divided between the Fort Hall and Wind River Tribes. Essentially, what the attorneys and the Shoshone entities agreed upon, although the cases had been consolidated, was that the Fort Hall Tribes be paid for their interests in Northwestern Bands, Mixed Bands of Shoshones and Bannocks and Fort Hall reservation claims awards, including cessions made after the Doty treaties, and Bannock tribal funds. The Wind River Tribe, the Fort Hall Tribes and the Northwestern Bands shared the portion of the award deriving from Dockets 326-H and 367, that is, the aboriginal lands of the "Shoshone Tribe" described above.

The Wind River Shoshone Tribe is an organized, reservation based entity, as is the Shoshone-Bannock Tribes of Fort Hall.

The "Northwestern Bands" included in the 1971 Act is not an organized tribal entity, but a group of Shoshone at Washakie, Utah, who formed a Mormon colony. Some individuals acquired allotments at the site. The entity is by no means to be regarded as the full successor to the historic Northwestern Bands which in itself must have been rather fluid in composition. For example, by an 1877 Executive Order a reservation for what was then considered the Northwestern Bands was established at Carlin Farms, Nevada. In 1879, with the revocation of the Executive Order, about one third of the people, then designated "Western Shoshones" were removed to the Duck Valley Reservation which had been established also in 1877. Most of the rest scattered to other locales in Nevada. As early as 1909 Anthropologist Alfred E. Kroeber found that the Mormon settlement

at Washakie was comprised of Shoshone from all parts of the claimed areas. In 1873 federal officials prevailed upon part of the Northwestern Shoshone (a group under Pocatello) to settle on Fort Hall Reservation and another part to settle on Wind River Reservation.

We emphasize that Shoshone other than the Wind River and Fort Hall Tribes, as such, and descendants deriving from certain rolls of Washakie, Utah, Shoshone, did not and could not participate in the Shoshone Tribe award despite the amalgamation of Shoshone entities. In fact, the 1971 Act provided that a Northwestern Bands descendant would be precluded from sharing if he elected to participate in the then pending Western Shoshone and Goshute awards.

The Lemhi Tribe
(Docket 326-I)

This award of $4,500,000 was the subject of the Act of September 29, 1972,

86 Stat. 743. The award was granted for the aboriginal lands of the Lemhi Shoshone which were taken in 1875 when an Executive Order reservation was established for them. This Lemhi Valley Reservation in northern Idaho was revoked by an 1880 Agreement ratified in 1889. Reluctantly, the Lemhi Shoshone, including Bannocks and Sheepeater Shoshone, moved to Fort Hall in 1907. The 1972 Lemhi Act vested the award exclusively in the Shoshone-Bannock Tribes of Fort Hall as the representative of and successor to the Lemhi Shoshone. It should be noted that adding to the conglomorate [sic] within the Fort Hall Tribes are some Boise and Bruneau Shoshone who were moved to Fort Hall in 1868.

The Goshute Shoshone
(Dockets 326-B and J)

The Goshute were granted an award of $7,000,000 which was handled in a Secretarial Plan effective October 19, 1979. The plan provides that the award be

divided on the basis of the respective memberships of the Confederated Tribes of Goshute Reservation and the Skull Valley Tribe. These two tribal entities were found to be the sole successors to the historic Goshute Shoshone. No other Shoshone are participating.

Consistent with the findings of the Indian Claims Commission, the provisions of the Shoshone Tribe and Lemhi Acts, and the Goshute Secretarial Plan, we conclude that the following individuals are precluded from participating in the Western Shoshone award:

a. members of the Shoshone Tribe of Wind River Reservation;

b. members of the Shoshone-Bannock Tribes of Fort Hall Reservation;

c. members of the Confederated Tribes of Goshute Reservation;

d. members of the Skull Valley Tribe;

e. the Washakie, Utah (Northwestern Bands), Shoshones who participated in the Shoshone Act of December 18, 1971, 85 Stat. 737; and

f. those persons whose Shoshone ancestry is derived solely from the Boise or Bruneau Bands.

Other preclusions must now be discussed in relation to the California award.

C. THE CALIFORNIA SPLINTER GROUP PROBLEM

In its deliberations on the Indians of California claim in Dockets 31, 37, etc., the Indian Claims Commission concluded on March 3, 1964, that the Quechan (Yuma) Tribe was not a proper party to the California suit since the Quechan claim included lands in Arizona in addition to California. The decision of the Commission affected also the other tribes and groups whose claims only partly included California lands. These entities came to be known as the "splinter groups". They are, in addition to the Quechan Tribe, the Northern Paiute, the Southern Paiute, the Mohave Tribe, the Chemehuevi Tribe, the Klamath and Modoc Tribes and

the Yahooskin Band of Snakes (and the Walpapi Paiutes), the Washoe Tribe and the Shoshone Tribe. Accordingly, the Act of September 21, 1968, 82 Stat. 860, providing for the disposition of the Indians of California award precluded individuals from sharing in that award and also any of the splinter group awards. Persons of mixed "California" and "splinter group" ancestry were required to make a choice. Similar preclusions have appeared in all of the legislation and Secretarial plans for the disposition of the splinter group awards.

The subject report concerns the last of the splinter group awards, that of the Western Shoshone. The Shoshone Tribe, the Lemhi Shoshone, and the Goshute awards are not, although they have sometimes been referred to as such in earlier Bureau reports, splinter groups since after separation by the Indian Claims Commission

only the Western Shoshone award involved California land. The splinter group preclusions, therefore, are not found in reference to the earlier Shoshone awards. They are found, for example, in the Northern Paiute Secretarial Plan effective October 10, 1974. Individuals who had shared as an Indian of California, who are members of the Washoe Tribe, who had shared in the Chemehuevi award, etc., are precluded from sharing in the Northern Paiute award. Many Nevada and California people are of both Western Shoshone and Northern Paiute ancestry.

Some of the splinter group awards have been vested solely in descendant entities (as was the California award) and others wholly or partly in tribal successor entities. Consistent with the handling of the California award and the splinter group awards, individuals in the following categories are precluded from sharing in

the Western Shoshono award:

a. those who participated in the Indians of California award in Dockets 31, 37, 80, 80-D and 347;

b. those who elect to participate (the roll is nearly complete) in the Northern Paiute award in Docket 87 and, by extension, those who participated in the Malheur Paiute award in Docket 17;

c. those who participated in the Southern Paiute award in Docket 88 or who are members of the Moapa Paiute Tribe or the Kaibab Paiute Tribe;

d. those who participated in the Mohave award in Dockets 283 and 295 or who are members of the Fort Mohave Tribe;

e. members of the Washoe Tribe of Nevada and California (Docket 288);

f. members of the Quechan Tribe (Docket 319);

g. those who participated in the Chemehuevi award in Docket 351; and

h. members of the Klamath Tribe (terminated) (Docket 100) or whose Indian ancestry is derived solely from the Yahooskin Snakes or Walpapi Paiutes, all associated with the Klamaths and Modocs of the former Klamath Reservation.

D. IDENTIFYING THE WESTERN SHOSHONE BENEFICIARY

The Indian Claims Commission found the Western Shoshone Identifiable Group to be

a land-using entity with cultural and economic but little political cohesion. They did not and do not today form a single political entity. Other than the temporary formation of some relatively large groups during the period of Shoshone-American hostilities, the usual grouping was in small camps, often no larger than family units. Larger groupings formed occasionally or seasonally as Western Shoshone interacted or cooperated in such activities as pine nut gathering, rabbit or antelope drives and limited ceremonialism. Their total numbers have always been and are still very small.

We have reviewed the high mobility, the fluidity and the amalgamations, partly effected by actions of the Federal Government, which characterized the various Shoshone subdivisons and reservation entities. We conclude that

the representatives of the Western Shoshone are those Shoshone and their descendants who remain after precluding the Wind River, Fort Hall, Washakie, Utah, and Boise and Bruneau Shoshone, the Indians of California, and the splinter groups described above.

The Western Shoshone entities were and are extremely scattered. It is not possible to describe the Western Shoshone in terms of forming a tribe or a group of organized tribes, particularly in view of the Shoshone-Paiute combined organizations and the very real possibility that many Western Shoshone descendants (including those who strongly identify as Shoshone people) are not and never have been associated with any reservation entity. One reason for the development of this situation was the strong proclivity of Western Shoshone families to attach themselves to scattered ranches and other

establishments in the Nevada-California area. It does not follow, however, that Shoshone who have shared in the awards of other Shoshone land holding entities cannot and should not be distinguished from the Western Shoshone. As so-called Northwestern Bands people, for example, included rather recent arrivals from the Nevada area, so did the Nevada area Western Shoshone accrue Shoshone from areas north of them or from the Goshute. In the simplest terms, the present-day Nevada and California Shoshone have always been or have become the Western Shoshone.

Western Shoshone descendants may be found in many States. They are, however, in general very strongly associated with the Nevada and California reservation entities listed below and with the towns and cities near those reservation and colonies. Most of their communities, whether federally recognized or not, are

very small. With the preclusion of so many groups from participating in the award, the total Western Shoshone descendant entity may not number more than a few thousand.

Contemporary Western Shoshone Entities

Nevada

1. Te-Moak Bands of Western Shoshone Indians, Nevada (Elko, Battle Mountain, South Fork and Wells); estimated enrollment 1200 (all enrollment figures were provided February 1980, by the Phoenix Area Office).

2. Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada (extends into Idaho); estimated enrollment 1200. Many of these people have or will have participated in the Malheur and Northern Paiute awards.

3. Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada; actual enrollment 228, probably all Shoshone.

4. Yomba Shoshone Tribe of the Yomba Reservation, Nevada; estimated enrollment 300, probably all Shoshone.

5. Ely Indian Colony of Nevada; estimated enrollment 170, probably all Shoshone.

6. Reno-Sparks Indian Colony, Nevada; estimated enrollment 670. The great majority of the enrollees are Washoe and Northern Paiute.

7. Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; estimated enrollment 620, a very small minority of Shoshone.

8. Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada; estimated enrollment 500, a very small minority of Shoshone.

9. Walker River Paiute Tribe of the Walker River Reservation, Nevada; estimated enrollment 1,000, a very small minority of Shoshone.

10. Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada; estimated enrollment 500, a very small minority of Shoshone.

Persons of Western Shoshone ancestry are undoubtedly to be found associated with other reservation entities in Nevada. Western Shoshone, perhaps intermingled with Southern Paiute, are reportedly residing in the Pahrump Valley area in Nevada.

California

1. Owens Valley Paiute-Shoshone Band of Indians (includes Bishop, Big Pine, Fort Independence and Lone Pine Reservations); estimated enrollment 1,500, a minority of Shoshone.

2. Death Valley Timbi-Sha Shoshone Band. This group has recently submitted a petition for federal acknowledgment as an Indian tribe. Since the 1930's these Western Shoshone have been occupying, on the basis of a National Park Service permit, a forty acre site known as Furnace Creek Village within the Death Valley National Monument. The community claims a membership of about 150, with 35 residing in the village. The Death Valley Band has a 1978 Articles of Association and an elected council of five members. Bureau of Indian Affairs censuses [sic] of 1933 and 1936 were developed for them. To our knowledge they form the only Western Shoshone community, as such, which is not associated with a federally recognized tribe.

We find those Western Shoshone people, and their descendants, who derive from the censuses [sic] and other rolls of the above cited entities, and other descendants who prove Western Shoshone ancestry on the basis of rolls and records to the satisfaction of the Secretary of the Interior, to be the beneficiaries of the award in Docket 326-K. All necessary preclusions shall appear in the Secretarial plan or legislatiaon for the disposition of the award.

At a general meeting held at Elko Colony on February 23 and chaired by the Chairman of the Te-Moak Bands, a Western Shoshone Planning Committee was officially formed. This committee is well representative of various Shoshone reservation and off-reservation communities in Nevada and intends to include California entities. The committee is charged, among other things, with the development of a proposal for the use and distribution of the judgment funds and to that end is expected to meet with and seek advice from their respective constituencies. It is most important that this report be made available to all members of the committee.

s/WILLIAM HALLETT
Commissioner of Indian
Affairs

APPENDIX K

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN 20 1980

Honorable John Melcher
Chairman, Senate Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

With this letter we are requesting an extension of the period for the submittal of a Secretarial plan for the Western Shoshone award in Docket 326-K before the Indian Claims Commission.

The award of over $26 million was granted on August 15, 1977, but litigation and other actions initiated by some Western Shoshone entities delayed until December 19, 1979, the appropriation of covering funds. Under the provisions of the 1973 Indian Judgment Funds Act the initial 180-day period for the submittal

of a Secretarial plan ended on June 16, 1980. However, it was not until June 14 that the Western Shoshone Planning Committee, meeting in Reno-Sparks Indian Colony in Nevada, developed a formal proposal for the distribution of the funds.

The Planning Committee proposal, and a Secretarial proposal, will be the subjects of a Hearing of Record scheduled July 26 at the Convention Center in Elko, Nevada. Shortly after the hearing we expect to be able to submit a Secretarial plan. We respectfully request, therefore, that a 90-day extension from June 16 be granted.

We would much appreciate an early response to this request. Thank you for your attention to the matter.

Sincerely,

s/RALPH R. REESER

Acting Deputy Assistant
Secretary-Indian Affairs

cc: Phoenix Area Director
Sacramento Area Director

APPENDIX L

WESTERN SHOSHONE SACRED
LANDS ASSOCIATION

429 WALNUT STREET
ELKO, NEVADA 89801

(702) 738-6494

Honorable Morris Udall, Chairman
House Interior and Insular
Committee
House of Representatives
Washington, D.C.

Honorable John Melcher, Chairman
Senate Select Committee on Indian
Affairs
United States Senate
Washington, D.C.

July 31, 1980

RE: July 26, 1980 Hearing of Record with regard to the Western Shoshone Indian Claims Commission judgement award 326-k.

Gentlemen:

On July 26, 1980 the Bureau of Indian Affairs held the only public hearing of record with regard to the Western Shoshone Indian Claims Commission judgement docket 326-K. Those Shoshones that testified

overwhelmingly opposed acceptance of the $26 million dollars. Of those that testified, 67 opposed the acceptance of the distribution funds; while only 14 supported either the Bureau of Indian Affairs, the Western Shoshone planning committee, or their own distribution plan. Thus approximately 80% of those that testified were adamently opposed to acceptance of the judgement fund. Many of those that testified proposed an alternative plan of placing the judgement funds in the bank, until there has been a definitive ruling on Shoshone land rights. Others, especially the very old and very young, outright opposed acceptance of any money at all. .

It is incumbent upon the United States Congress to give full attention to the wishes of the Shoshone people. It is important that you remain fully aware of what is occurring in this situation. Many

Shoshone people, especially after the Dann decision which held that Shoshones retained title only until the Indian Claims Commission juogement became final - - feel that the United States government is using the Commission process to deprive us of our treaty and land rights. Given all the facts, in their proper perspective, there is a great deal of truth to this assumption. I have attached two documents for your review relevant to the July 26 hearing: my written testimony which explains in detail the Shoshone challenge to the validity of the Indian Claims Commission process; and a press release developed by our organization.

It has come to our attention that the Bureau of Indian Affairs is attempting to minimize the outcome of the public hearing because it was unfavorable towards consummating the distribution plan. We hope that Congress will make some attempt

to get to the heart of the issue. The Western Shoshone Sacred Land Association proposes that Congress not permit an extension of time for the Department of the Interior to complete the distribution plan process. The future of the Western Shoshone people is at stake. We hope that you will assist us in assuring that the Shoshone people are given the opportunity to be heard in this vitally important matter.

Sincerely,

s/RAYMOND YOWELL, Chairman

Enc:

APPENDIX M

UNITED STATES SENATE

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

August 4, 1980

Ralph R. Reeser
Acting Deputy Assistant
Secretary of Indian Affairs
Office of the Secretary
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Reeser:

Thank you for your report on the Department's progress in the preparation of a plan for the distribution of judgment funds awarded the Western Shoshone in Docket No. 326-K before the Indian Claims Commission.

The Indian Judgment Fund Distribution Act of 1973, 87 Stat. 466, provides for a 90-day extension of time in which to submit the department's plan to the Congress. As a general rule, such

extensions are routinely granted upon Departmental request. However, there are several factors which weigh against granting the extension in this case.

It appears that a significant number of Western Shoshone people oppose acceptance of the award at this time. There is pending litigation in the case of U.S. v. Dann in the U.S. District Court for the district of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue.

An additional consideration involves the provisions of the 1973 Act itself. The Act provides that a distribution plan must lie before the appropriate Indian committee on both the House and Senate

side for 60 working days. There are approximately 40 working days left in this Congress. If an extension was granted the new deadline for submission would be September 14th. It is doubtful such a deadline could be met, but, in addition, it appears a legal issue has been raised with respect to counting days in the present 96th Congress with days in the approaching 97th Congress in order to achieve the necessary 60-day period. This may not be an insurmountable obstacle, but under the circumstances it would appear that this could lead to legal challenges that could further tie up the resolution of this claim and the distribution of the award.

Under these circumstances, it is my conclusion that the extension should not be granted. I trust the Department will submit appropriate legislation early in the 97th Congress.

With best regards,

Sincerely,

s/JOHN MELCHER

Chairman

APPENDIX N

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs
Washington, D.C. 20245

In Reply Refer To:
Tribal Government Services

JAN 22, 1982

Memorandum

To: Phoenix Area Director

From: Acting Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: Amended Results of Research Report on Western Shoshone Award in Docket 326-K

This memorandum replaces that of August 20, 1981, on essentially the same subject, and constitutes an amendment to the original Results of Research Report of March 11, 1980, relating to the subject award. This action is prompted by the Bureau's overall policy to designate successor tribes as beneficiaries of claims awards whenever possible in order

for those tribes that so wish to develop programming proposals for the use of judgment funds.

In this instance it is clear, as indicated in the March 11, 1980, report, that all of the tribes cited below are composed of individuals who are at least in part Western Shoshone and who have probably not participated in those awards which would preclude them from being beneficiaries of this one:

1. Te-Moak Bands of Western Shoshone Indians (includes Elko, Battle Mountain, South Fork and Wells); estimated total enrollment is 1,200.

2. Duckwater Shoshone Tribe of the Duckwater Reservation; enrollment is about 230.

3. Yomba Shoshone Tribe of the Yomba Reservation; enrollment is about 300.

4. Ely Indian Colony; enrollment is about 170.

Consequently, we are designating these tribes as tribal successors to the Western Shoshone entity of the period of 1853-1872 (the California and Nevada taking dates)

and beneficiaries of a part of this award. The remaining beneficiaries consist of all other persons of Western Shoshone ancestry, in their individual capacity, who otherwise meet the criteria detailed in the March 11, 1980, Results of Research Report.

In connection with this determination, several additional items of explanation are in order. First, it is expected that the method employed to establish tribal shares, which has been explained at Western Shoshone general meetings, will be based on the numbers of members in each of the four tribes who have not participated in the California award or in any of the earlier "splinter group" awards such as Northern Paiute. Those tribal members who have so participated would not be included for purposes of determining a tribal share of the funds. Further, such tribal members would not be entitled to a per

capita share under any use and distribution proposal developed by the affected tribe.

Second, we should now begin working with the beneficiaries on the development of the legislation which will be required in this instance. With respect to the tribal beneficiaries, our policy in working with them should be guided by the language of P.L. 93-134 insofar as programming of funds is concerned.

Third, there may be questions as to whether a tribal member ineligible for a per capita payment would be eligible to participate in tribal programming through the use of the same award funds. While this might well be specifically covered in the legislation, we believe the proper approach would be that such persons who are ineligible to receive per capita shares could nevertheless participate fully in tribal programs resulting from

the award.

To move forward on this matter we believe you may wish to call a general meeting of all of the Western Shoshones in order to advise them of this amendment to the Results of Research Report. It would appear that separate meetings should then be held with the tribal governing bodies of the four successor tribes to work with them toward the development of proposed legislation. To be kept in mind during this process is the fact that the actual introduction of legislation may not be possible until the Dann litigation is completed. However, this should not preclude beginning the process of working with the tribes to clarity their desires with respect to programming and to initiate appropriate planning with them providing such technical assistance as requested and as resources permit.

Should you have any questions or if

this office can be of assistance, please let us know.

s/THEODORE G. KRENZKE

APPENDIX O

PAUL LAXALT
Nevada

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON JUDICIARY

UNITED STATES SENATE
Washington, D.C. 20510

May 20, 1983

Dear Jim:

The Western Shoshone Indians have lived in Central Nevada for thousands of years. In 1868, Congress ratified the Treaty of Ruby Valley, whereby the United States acquired rights-of-way across Shoshone lands, but no lands were ceded. In 1979, the U.S. Court of Claims awarded $26 million in an Indian Claims Commission Act proceeding for the value of Shoshone land and mineral rights in Nevada. A large number of Shoshones protested the

award of compensation for a land taking, however, on the grounds that, under the Treaty of Ruby Valley and relevant law, no lands were taken. Strong opposition from Western Shoshone Tribes and individuals has prevented distribution of the judgment, and the Senate Select Committee on Indian Affairs has taken the position that legislation will be required incorporating an overall agreement with respect to Western Shoshone land rights and to pay the award. The Western Shoshone Tribes have united to coordinate the effort to obtain such legislation.

I support the Western Shoshone effort to settle this long-standing problem by negotiating with the United States. I believe that a negotiated agreement is consistent with this Administration's effort to resolve Indian land and water claims by negotiation, rather than expensive and protracted litigation, and

that it would remove a burdensome cloud on land, mineral and water titles in Central Nevada which has created a climate of uncertainty. I urge the Department of the Interior to identify representatives to meet with Western Shoshone representatives to negotiate draft legislation to achieve this purpose.

I will, of course, work closely with the Department of the Interior and my Congressional colleagues to be sure that the interests of the people of Nevada and the Nation as a whole are fully considered.

Sincerely,

s/PAUL LAXALT
U.S. Senator

PL:kmw

The Honorable James G. Watt
Secretary of the Interior
Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

APPENDIX P

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs
Washington, D.C. 20245

In Reply Refer To:
Social Services

APR 23, 1984

Thomas E. Luebben, Esq.
Luebben, Hughes and Tomita
201 Broadway, SE
Albuquerque, New Mexico 87102

Dear Mr. Luebben:

We are responding to your letter of February 6 in which you enclosed documents on the organization of the Western Shoshone National Council, whose purpose is to serve as a negotiating entity to undertake negotiations with the United States in drafting a proposed legislative settlement on the Western Shoshone Judgment Award in Docket 326-K.

Based upon the documents submitted and the meetings held March 10 in Austin, Nevada and March 17 in Reno, Nevada, it is

clear that the Western Shoshone National Council represents by far the majority interests of the Western Shoshone people. It is primarily the Council that we will look forward to working with in developing a proposed legislative settlement, although we will continue to allow other minority interests to voice their concerns and opinions.

With regard to your request for the appointment of a Federal task force under the direction of the White House, it is our considered judgment that such a task force is premature at this stage of preliminary negotiations. Along with the issue of land, a primary concern is the Western Shoshone Judgment Award in Docket 326-K and the application thereto of 25 U.S.C. 1401-1408 which, by the very nature of the matter, must be a part of the legislative proposal.

Therefore, it is our position that we

will continue during this stage of the negotiations to assume the lead role in representing the United States, both in the issue of the distribution of the judgment award and the question of land. At some time in the future, your suggested formation of a Federal task force may well have merit.

Sincerely,

s/ JOHN W. FRITZ

Deputy Assistant Secretary -
Indian Affairs (Operations)

APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY OSCEOLA,

Plaintiff,

Civil Action No. 76-492

v.

JEROME K. KUYKENDALL, et al.,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter comes before the court on plaintiff's application for a temporary restraining order. Upon consideration of the application, memoranda submitted in support thereof, defendants' opposition thereto, oral argument thereon, and the entire record herein, the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, Guy Osceola, is a Seminole Indian, born and presently residing in the "territory of the Seminole Nation", otherwise known as the State of Florida.

2. Plaintiff sues on his own behalf and on behalf of the class composed of "those Seminole people who by Seminole law and usage are entitled to live in and utilize Seminole land and other property, and who do not wish to surrender such rights in return for monetary damages or compensation and who have not actually authorized nor consented to the presentation of a claim to the Indian Claims Commission." Complaint ¶5.

3. Defendants are the Chairman and Commissioners of the Indian Claims Commission (ICC). The Commission, pursuant to the Act of August 13, 1946, 25 U.S.C. §§70-70v, is presently adjudicating the claim of the Seminole Nation to

compensation for those portions of the tribe's territory appropriated by the United States.

4. The proceeding before the ICC was initiated in 1950 by a group designated as the Seminole Indians of the State of Florida. In 1951, a group designated the Seminole Indians of Oklahoma filed a petition which overlapped the claim asserted in 1950, and the two petitions were consolidated. Each petitioner purported to represent the Seminole Indian Nation as it existed in Florida prior to 1823 and sought compensation for the wrongful acquisition of Seminole territory by the United States under the Treaties of September 18, 1823, 7 Stat. 224, and May 9, 1832, 7 Stat. 368.

5. In 1954, representatives of the Miccosukee Tribe, of which plaintiff Osceola is a member, filed a "Motion to Quash" the petition of the Florida and

Oklahoma Seminoles. The ICC dismissed the motion. The Court of Claims affirmed the Commission's action, stating, in part, that the ICC proceeding would not determine title to any lands. See Billie v. The Seminole Indians of the State of Florida, 137 C.Cls. 161 (1956). A similar motion was dismissed summarily by the ICC in 1961.

6. The 1957, certain Seminoles in Florida organized themselves under the Indian Reorganization Act of 1934, 25 U.S.C. §476, and were substituted as petitioner in the proceeding before the ICC.

7. On January 11, 1962, a group called the Miccosukee Tribe became federally recognized under the Indian Reorganization Act. In January, 1968, this group moved to intervene in the proceeding before the ICC. The Commission denied the motion on the grounds that the

interests of this group was represented by the present petitioners. Plaintiff Osceola and the class he purports to represent are not members of the federally recognized Miccosukee organization, and they disavow the group's attempt to share in any monetary settlement of the claims before the Commission.

8. In 1970, the ICC entered a final judgment for $12,262,780.63. 24 Ind. Cl. Comm. 1 (1970). Both sides appealed and the Court of Claims remanded the case to the Commission for more detailed findings of fact. See Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma v. United States, 197 C.Cls. 350 (1972).

9. Pursuant to negotiations and approval by all parties, a joint motion for entry for final judgment was filed with the Commission on March 17, 1976, which would settle all claims for

$16,000,000. A hearing of that motion was held on March 26, 1976. Plaintiff did not appear at the hearing or participate in the settlement negotiations.

10. Money judgments of the ICC are paid in accordance with 25 U.S.C. §1401, et seq., after a supplemental appropriation is obtained from Congress. This procedure entails a delay of several months between judgment and payment.

Conclusions of Law

1. In order to obtain a temporary restraining order, plaintiff must prove (1) there is a substantial likelihood of prevailing on the merits, (2) he will suffer irreparable harm without an order, (3) a restraining order will not cause substantial harm to defendants, and (4) a restraining order would further the public interest. See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C.Cir. 1958).

2. Plaintiff alleges that the proceeding before the Commission will deprive him and members of his class of their property without due process of law, since the statutory representative is not adequate. Specifically, plaintiff complains of 25 U.S.C. §70i, which provides that the representative of an Indian group recognized by the ICC shall be the exclusive representative of the group for the purpose of prosecuting claims before the Commission, and 25 U.S.C. §70u, which provides that once a claim is adjudicated by the Commission, all further claims by any party are forever barred.

3. The court finds that, even assuming plaintiff's constitutional argument to be sound, he has failed to prove that irreparable injury is imminent. The Act's res judicata bar is not effective until claims are paid. See

Western Shoshone Legal Defense and Educational Association v. United States, Appeal No. 3-75, at 14 n. 16 (Ct. Cl. February 18, 1976). Plaintiff's representation at oral argument that the entry of a judgment alone will place members of the class, unfamiliar with the workings of the legal system, in jeopardy of immediate eviction is sheer speculation. Plaintiff's affidavits and proffered testimony fail to indicate even a remote likelihood of imminent eviction. Certainly, such action will not be undertaken by the United States, whose counsel stated in open court that he did not view the Commission proceedings as affecting title to land in any way and that the United States contemplated no action of any kind against plaintiff or his class. The court cannot justify granting the extraordinary relief requested on the basis of vague statements

that unknown persons might be contemplating action against Seminoles residing off the reservation.

4. Issuance of an order restraining the entry of judgment by the ICC will delay the ultimate payment of the claim, thus injuring petitioners before the Commission. Since it appears to the court that no harm can come to plaintiff until the date of payment, there is no justification for delaying the procedures necessarily preceding payment.

In light of the above findings of fact and conclusions of law, plaintiff's motion for a temporary restraining order must be denied. An appropriate order accompanies this memorandum.

s/THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

4-7-76
Date

APPENDIX R

TE-MOAK BANDS OF WESTERN SHOSHONE
P.O. Box 1607
Elko, Nevada 89801

January 19, 1977

Secretary of the Interior
Department of the Interior
Washington, D.C.

Re: Western Shoshone Identifiable
Group, Represented by the Temoak
Bands of Western Shoshone
Indians vs. United States

Indian Claims Commission
Docket No. 326-K

Dear Mr. Secretary,

I am the Chairman of the Temoak Bands of Western Shoshone Indians which is representing all Western Shoshone people in a claim before the Indian Claims Commission. Supposedly, our tribal council is supposed to be in charge of the litigation and according to the Indian Claims Commission and the Court of Claims we have "elected" to give up our title to our ancestral lands in order to get money

damages.

Really, the claim has been run by the claims lawyers who have included lands in the claim that we still claim title to. Despite repeated requests these lawyers have refused to test the title to these lands before including them in the claim. Recently a group of Western Shoshone Indians attempted to assert title to these lands in a trespass suit but the judge said they couldn't because the lands were included in the claim. The claims lawyer has told us many times that his actions would not affect our title but it has.

There are many strange things about the way these lawyers have operated. They no longer report to us but to a "claims committee" which was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the lands we still have but have fought

our people who have tried to do it themselves through the Western Shoshone Legal Defense and Education Association.

We have now fired these claims lawyers and are looking for a replacement. I have been directed by the Business Council to appeal to you to assist us in replacing the lawyers and to intervene in the Indian Claims Commission case and protect our interests in controlling our claim. We feel that the Indian Claims Commission pays more attention to those lawyers who work there all the time than to us.

The United States has moved to dismiss the claim entirely because we have asked the Commission to stay its proceedings until we find out what our rights are. We feel this is very unfair. We think the United States should help us solve our problems instead of taking advantage of our problems with our lawyers.

The United States has told the

Commission that they do not have to pay attention to us, that only lawyers can speak for us. We are told that the Secretary of the Interior can provide legal help to Indians even when the United States is on the other side. Would you please help us. Many of our people do not speak English and are very poor. These lands are very important to our people and our religion. If we lose them our people will no longer be Western Shoshone because Mother Earth is our religion.

I am sending you a copy of the resolution and the paper we are sending to the Indian Claims Commission. I have sent other papers to Mr. Joe Membrino in your solicitor's office.

Respectfully yours

s/LESLIE BLOSSOM
Chairman, Temoak Bands of
Western Shoshone Indians

APPENDIX S

TE-MOAK BANDS OF WESTERN SHOSHONE
Battle Mountain, Nevada 89820
BATTLE MOUNTAIN INDIAN COLONY

January 27, 1977

FROM: Leslie L. Blossom,
Tribal Chief
Te-Moak Bands of Western
Shoshone Indians of Nevada

TO: All Western Shoshone Indians
of Nevada

The Te-Moak Bands of Western Shoshone Indians has recently taken some strong actions on behalf of all Western Shoshone Indians in the Indian Claims Commission: We have asked the Commission to postpone final decision until the Dann Case is settled and we have discharged the claims lawyers, Wilkinson, Cragun and Barker. We recognize that these actions affect all WESTERN SHOSHONE INDIANS....not just the members of the Te-Moak Bands.....and we do not like being in the position of making decisions for people who do not

vote in our elections, and we have told the Claims Commissions this. However, both the Claims Commission and the Court of Claims ruled that the Te-Moak Bands IS the EXCLUSIVE representative of all Western Shoshone Indians concerning the claim when the Western Shoshone Legal Defense and Education Association tried to appear before the commission. So whether we like it or not, the Te-Moak Bands is the only group that can speak to the commission and we felt there were things that had to be said.

First, the court of claims said that the Te-Moak Bands had chosen to ask for money for the So-Called public domain lands instead of demanding our rights to these lands..... that we had decided to give up our claim (OR "SELL") these lands. I have talked to my predecessors and this is not true..... they were not ever even asked to decide. I do not believe even

the "Claims Committee" ever made such a choice. As most Western Shoshone know, whenever this question came up at claims meetings, the claims attorneys told us that we were NOT giving up or selling anything, that we had No Choice between taking money or trying to get land back. Mr. Barker made the choice for us and told the commission that we had no title and our treaty was no good.

The Western Shoshone Legal Defense and Education Association tried to assert our title to these lands as a defense in the trespass case brought by the United States against the Dann Sisters. They challenged the United States to prove that the United States had ever Extinguished our titled and the United States Coulan't Do It.

The Judge thought about the case for fifteen months and apparently he could not think of how the United States got title either because he finally ruled not that

our title was, but that we could not argue we still had it because of the claim in the Indian Claims Commission.

The Association tried to get the commission to change this a couple of years ago, because they were afraid this would happen, but Mr. Barker convinced the Commission that the claim could have no effect on the Dann Case. He was wrong. In fact, it appears like the only thing standing between us and our rights to these lands is Mr. Barker's actions in the Indian Claims Commission.

The Judge in the Dann Case assumed the claims case was final but it is still pending and is not binding upon us until it is final. We believe most Western Shoshone would rather keep out [sic] Title to these lands than give them up for less or around a Dollar an acre. So, we have fired Mr. Barker and his firm since they refuse to help us protect our title and

have actually worked against us in this regard. We want to hire a claims lawyer who will represent us all before the commission and protect our title. It seems to us that there is no need to fight among ourselves when we can hire a lawyer who will at least let us try to keep our land. If we fail, then we can still get the money for all the land. But it would be stupid to give up our claim to these lands without first at least trying to see if we can get the courts or the Secretary of the Interior to recognize that we still have Title. We ought to at least ask another lawyer, who is not personally involved, to give us an opinion as to whether we should try to keep our lands or just give up as Mr. Barker wants.

We have asked the Secretary of the Interior to help us with this problem and to make sure our rights are protected which is his job. I understand that

lawyers from the Department of the Interior (which is over the BIA) are now investigating.

We are trying our best to find our [sic] what is the best thing to do for all the Western Shoshone People. We would appreciate hearing from the Western Shoshone People whether they want us to see if our title is any good before we give it up Forever in the Claims Commission. I would like to thank all the Western Shoshone People for taking the time to read this.

Sincerely,

s/LESLIE L. BLOSSOM, Chief
Te-Moak Bands of Western
Shoshone
P. O. Box 1607
Elko, Nevada 89801

APPENDIX T

THE WESTERN SHOSHONE NATIONAL COUNCIL ORGANIZATIONAL STATEMENT

ARTICLE I. PURPOSES

The Western Shoshone people hereby organize for the purpose of uniting all Western Shoshone interests into one entity, to promote the formation of a Western Shoshone Nation negotiating team to undertake negotiations with the United States for a legislative agreement confirming Western Shoshone ownership of lands within the Western Shoshone ancestral territory and to foster and promote the establishment of a formal Western Shoshone National Government exercising the full scope of governmental sovereignty, powers and jurisdiction available to the Western Shoshone Nation.

ARTICLE II. MEMBERSHIP

1. The following listed Western

Shoshone communities, entities and organizations shall be eligible for initial membership in the Western Shoshone National Council:

Battle Mountain Community Council
Big Pine Western Shoshone Indian Community
Dann Band of Western Shoshone Indians
Duckwater Shoshone Tribe
Duck Valley Reservation Shoshone Organization
Elko Community Band Council
Ely Colony Council
Fallon Western Shoshone Organization
Great Basin Western Shoshone Descendants Organization
Lone Pine Western Shoshone Indian Community
McDermitt Reservation Western Shoshone Organization
South Fork Band Council
Te-Moak Bands Council
Timbisha (Death Valley) Shoshone Tribe
Western Shoshone Sacred Lands Association
Wells Band Council
Yomba Shoshone Tribe

2. Each of the above-named Western Shoshone communities, entities and organizations wishing to join the Western Shoshone National Council shall become a member and be entitled to participate in all meetings and activities of the

National Council upon presentation to the Council of a duly executed resolution of its governing body which authorizes it to be a member and which identifies its representative and alternate representative. Any Western Shoshone organizations other than those listed above who may wish to join the Council in the future may petition for membership by presenting a duly executed resolution of the organization petitioning for membership and naming its representative and alternate representative. The Council will determine whether to grant membership. A member may resign from the National Council by filing a resolution of its governing body to that effect.

ARTICLE III. GOVERNING BODY

1. The business and affairs of the Western Shoshone National Council shall be managed by a Council which shall at all times be comprised of at least three

representatives

2. Each tribal and organizational member of the National Council shall designate to the Council, by resolution, a representative and an alternate representative to the Council. Such representatives and alternates shall be recognized by the Council unless and until substitute persons have been designated by a later resolution of the member tribe or organization.

3. A majority of the representatives of the members of the National Council shall be considered a quorum for the purpose of conducting official business. No official business shall be conducted in the absence of a quorum, and all decisions shall be unanimous and by consensus.

4. The National Council shall hold meetings at such intervals as it deems necessary. Meetings shall be held at Austin, Nevada, and such other locations

as the Council may designate. No official meeting shall be held unless written notice postmarked no less than 7 days prior to the date of the scheduled meeting has been mailed to each representative and alternate; provided, however, that an official meeting may be held if a majority of all representatives waive this notice requirement.

5. Decisions of the National Council may be made without a quorum convened in an official meeting if ratified by three-quarters (3/4) of all representatives in writing.

6. It shall be the duty of each representative to the National Council to diligently represent the interests of the tribe, community or organization which he represents and to use his best efforts to fully inform his tribe, community or organization of the proceedings of the National Council and of the principle

issues facing the Western Shoshone Nation.

ARTICLE IV. TERRITORIAL JURISDICTION

The territorial jurisdiction of the Western Shoshone National Council shall extend to all of the Western Shoshone ancestral territory, and to such other lands as may hereafter be added thereto.

ARTICLE V. LEADERSHIP

The leaders of the Western Shoshone National Council shall be such as the National Council shall deem necessary.

ARTICLE VI. AMENDMENTS

This organizational statement may be amended by consensus at any official meeting.

ARTICLE VII. NONPROFIT PURPOSE

This organization shall be nonprofit and no part of its assets shall at any time inure to the benefit of any member or officer, or any private individual, except

that reasonable compensation may be paid for services rendered to or for the organization in furtherance of any of its purposes.

ARTICLE VIII. DISTRIBUTION OF ASSETS

Upon dissolution of the organization, the Western Shoshone National Council shall, after paying or making provision for paying all of its liabilities, transfer all of its assets equally to each member tribe.

APPENDIX U

RECOMMENDATION

NEVADA STATE MULTIPLE USE
ADVISORY COMMITTEE ON
FEDERAL LANDS

#84-1

WESTERN SHOSHONE LAND CLAIMS

WHEREAS, the Western Shoshone nation has occupied territory in central Nevada for thousands of years; and

WHEREAS, many Western Shoshone claim they did not relinquish title to their territory in the Treaty of 1872; and

WHEREAS, the claims of the Western Shoshone nation were considered by the United States Indian Claims Commission with a cash settlement offered to the Western Shoshone as payment for the lands allegedly acquired by the federal government in 1872; and

WHEREAS, many Western Shoshones have refused to accept the cash settlement since they feel they have never

relinquished the lands to the United States; and

WHEREAS, the Western Shoshones are continuing to press their claims to the lands in a series of law suits now in federal courts; and

WHEREAS, the Western Shoshones state that they will continue to assert their claims to the land until the issue is resolved, which could cloud any action on the federal lands within the area claimed by the Western Shoshone nation; and

WHEREAS, this issue could have a dramatic affect on Nevada and its citizens, especially those using federal lands claimed by the Western Shoshone nation:

NOW, THEREFORE, BE IT RECOMMENDED that Nevada support a full discussion and consideration of the problems associated with the rival claims of the Western Shoshone nation and the federal government

to these lands, and the exploration of a negotiated settlement of the dispute; and

BE IT FURTHER RECOMMENDED that State government keep itself abreast of this issue and take appropriate action to represent the State's interest in any lawsuits or negotiations.

s/JULIAN C. SMITH, JR.
Chairman

Adopted: June 30, 1984

AMICUS CURIAE

BRIEF

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No. 83-1476

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October Term, 1984

UNITED STATES OF AMERICA,

Petitioners,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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August 20, 1984

BEST AVAILABLE COPY

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QUESTION PRESENTED

In 1951, the Temoak Bands filed a petition before the Indian Claims Commission (Docket 326-K) seeking compensation for the extinguishment of title to Western Shoshone lands. Mary and Carrie Dann consistently opposed Docket 326-K as a threat to their right to occupy ancestral Western Shoshone lands. The Court of Claims denied motions to delete such lands from Docket 326-K or to stay the proceedings until title could be determined. Final judgment was rendered on December 6, 1979. Funds to pay the judgment were appropriated, and a treasury account was established in the name of the Temoak Bands.

In 1974, the United States sued to enjoin the Danns from using lands continuously occupied by the Dann Band from time immemorial. The Danns answered that Western Shoshone title remains

unextinguished. The district court held that, while the Indian title had never been previously extinguished, the Docket 326-K judgment itself extinguished title. The Court of Appeals reversed, holding that the mere appropriation of funds does not constitute "payment" under Indian Claims Commission Act Section 22(a) which would foreclose the Danns' occupancy of Western Shoshone ancestral lands.

Under these circumstances, does the mere appropriation of funds in response to a judgment enable the United States to invoke the discharge provision of Section 22(a) to eject Mary and Carrie Dann from otherwise unextinguished Western Shoshone title lands?

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---

BRIEF OF AMICUS CURIAE WESTERN SHOSHONE NATIONAL COUNCIL IN SUPPORT OF MARY DANN AND CARRIE DANN, RESPONDENTS.

The tribal governments and organizations joined herein file this brief Amicus Curiae in support of Mary Dann and Carrie Dann, Respondents, pursuant to Rule 36.1 of the Supreme Court Rules.

This brief is submitted with the written consent of all parties to the case lodged with the clerk.

INTEREST OF AMICUS

The Western Shoshone National Council[1/] consists of representatives from all nine federally-recognized tribal governments[2/] that are predominantly Western Shoshone in membership, the Dann Band of Western Shoshone Indians, the Western Shoshone Sacred Lands Association,

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[1/] The Organizational Statement of the Western Shoshone National Council is printed as Res.Br.App. T.

[2/] The federally-recognized tribes are organized under the Indian Reorganization Act of 1934, 25 U.S.C. Section 476, et seq.. They are the Temoak Bands Council, the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe, the Ely Colony Council, the Timbisha (Death Valley) Shoshone Tribe, the Battle Mountain Community Council, the Elko Community Band Council, the South Fork Band Council and the Wells Band Council. The last four named tribal entities are members of the Temoak Bands Council, a federation of Western Shoshone tribal governments organized under the Indian Reorganization Act in its own right. There are at least 12 additional federally-recognized Indian tribes (bands) in Nevada, Oregon and California that include a minority of Western Shoshone Indians in their membership. See Western Shoshone Identifiable Group v. United States, 652 F.2d 41, 42 (Ct.Cl. 1981). The Dann Band is an additional, but non-recognized Western Shoshone tribal entity.

and the Great Basin Western Shoshone Descendants Organization. The Western Shoshone National Council is a modern continuation of an ancient, traditional council which integrated the Western Shoshone Nation as a whole.

Several of the above-named entities, and individual Western Shoshone families, actively use and occupy for grazing and other purposes,[3/] pursuant to Western Shoshone title and without complying with federal public land laws, a total of approximately three million acres of Western Shoshone aboriginal lands claimed by the federal government. See Stewart, The Western Shoshone of Nevada and the U.S. Government, Exhibit 14-D, pp 3-4.

The purpose of the Western Shoshone National Council is to defend and advocate the land rights of the Western Shoshones, and to negotiate a legislative resolution of Western Shoshone land rights issues with the federal government. The Western Shoshone National Council joins as amicus curiae because the final outcome in this case may affect the National Council's efforts to protect Western Shoshone land rights.

STATEMENT

The proceedings in the case at bar and in Western Shoshone Identifiable Group, Represented by the Temoak Band of Western Shoshone Indians v. United States, 652 F.2d 41 (Ct.Cl. 1981) (hereinafter generally "Docket 326-K")[4/] are interrelated and exceedingly complex.

[3/] Western Shoshones also use and occupy lands throughout the Western Shoshone ancestral territory for traditional purposes, including hunting, fishing, gathering and religious activities.

[4/] There are several reported decisions in this proceeding. The principal opinions are as follows: Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387 (1962), the original opinion of the ICC defining the aboriginal area and determining liability [hereinafter cited as "Liability

(Continued on next page)

At the outset, it is important to understand who the various entities are, which of them are real, and which are mere fictions invented for the purpose of the litigation. The "Western Shoshone identifiable group", sometimes indicated

(Continued from previous page)

Opinion"]; Western Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5 (1972), the opinion determining the value of the Western Shoshone aboriginal lands [hereinafter cited as "Valuation Opinion"]; Western Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457 (1975), aff'd sub nom., Western Shoshone Legal Defense & Education Assoc. v. United States and Western Shoshone Identifiable Group, 531 F.2d 495 (Ct.Cl. 1976), cert. denied, 429 U.S. 885 (1976), the denial of the effort of the Western Shoshone Legal Defense & Education Association to intervene in the proceeding [Ct.Cl. opinion hereinafter cited as "WSLDEA Intervention Opinion"]; Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 311 (1977), a decision on valuation of minerals taken from the aboriginal area, and Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 304 (1977), an order denying plaintiff's motion to stay proceedings, both of which opinions were affirmed sub nom., Temoak Bands of Western Shoshone Indians, Nevada v. United States and Western Shoshone Identifiable Group Represented by the Temoak Bands of Western Indians, Nevada, 593 F.2d 994 (Ct.Cl. 1979), cert. denied, 444 U.S. 973 (1979) [hereinafter cited as "Stay Petition Opinion"]; and Western Shoshone Identifiable Group v. United States, 652 F.2d 41 (Ct.Cl. 1981), the decision on attorneys' fees [hereinafter cited as "Attorneys' Fees Opinion"].

as plaintiff in Docket 326-K, is a non-existent entity invented for the caption of the case. The Temoak Bands Council is but one of the twenty-two tribes, which are wholly or in part Western Shoshone. The "General Council of the Western Shoshone Bands of the Shoshone Tribe of Indians" was a politically-unorganized mass meeting of Western Shoshones held in Elko, Nevada on June 1, 1947. Memorandum of the Duckwater Shoshone Tribe, et al. in Opposition to the Motion and Petition for Attorney's Fees and Expenses in Docket 326-K at 45 (hereinafter "Duckwater Memorandum"). The "Western Shoshone Claims Committee" was a group of eight individuals from various Western Shoshone districts designated at four mass meetings held in 1965. 652 F.2d 41, 44 (Ct.Cl. 1981); Res. Br. App. I at I4-I5. Although the Indian Claims Commission (hereinafter "ICC") determined that the Temoak Bands had the capacity to

maintain the suit in Docket 326-K, 11 ICC 387, 388, a political entity even arguably representative of more than a small minority of all Western Shoshones did not exist.

In 1863, the United States entered into the Treaty of Ruby Valley with the Northern Bands of Western Shoshone Indians. The treaty is one of peace and friendship. It specifies the boundaries of certain Western Shoshone lands, but does not cede title to any of those lands, although it does grant the United Staes certain rights-of-way, a license to explore for and produce minerals, the right to establish ranches and agricultural settlements and other supporting rights.[5/]

[5/] Contrary to the assertions of amicus American Land Title Association (ALTA) there is no evidence that this proceeding threatens the titles of private landowners in Nevada. By the Treaty of Ruby Valley, the Shoshone agreed to the establishment of mines and agricultural settlements, railroads, military bases, and other facilities. Lands required for ranches and settlements are presumptively no longer Indian lands.

Congress has never abrogated or amended the Treaty of Ruby Valley. The United States has never declared that it was claiming title to all Western Shoshone lands.[6/]

Western Shosnone Indians have continuously insisted that the Treaty of Ruby Valley did not extinguish Western Shoshone title and that they still own and occupy Western Shoshone lands. Res. Br. App. C at C4-C5, F at F3-F4, J at J4-J7, L at L2-L3.

On August 16, 1947, at the urging of the BIA, the Temoak Bands Council approved a claims attorney contract. This contract was controlled and extended from time to time by the Secretary of the Interior and the Commissioner of Indian Affairs pursuant to 25 U.S.C. Sections 70n and 81.

[6/] A 1975 memorandum from the Acting Director, Office of Trust Responsibilities, to the Associate Solicitor for Indian Affairs acknowledged that Western Shoshone aboriginal title remains unextinguished. Res.Br.App. E.

Attorney's Fees Opinion, supra at 45. The Temoak Bands' attorneys were at all times subject to the supervision of agents of the defendant United States (plaintiff here). Id. at 43. The contract expired in 1968, and was never renewed by the Temoak Bands. It was, however, extended in 1968, 1970, 1972, 1974, 1976, and 1978 by agents of the United States despite the formal termination of the attorney-client relationship by the Temoak Bands in 1976.

In 1951, a Petition captioned Shoshone Tribe of Indians of the Wind River Reservation, et al. v. United States was filed in the ICC on behalf of all Shoshone Indians. Paragraph 2.(c) describes as a petitioner the Temoak Bands of Western Shoshone Indians suing on behalf of the Western Bands of the Shoshone Nation of Indians and on behalf of the Shoshone Nation or Tribe of Indians.

The petition is not inconsistent with

the view that Western Shoshone title remains unextinguished, but the case was litigated as a claim for compensation for a taking of all Western Shoshone lands. The Temoak Bands did not initially object to the Docket 326-K proceedings because they were repeatedly assured, even prior to the filing of the petition, that the proceedings would have no effect whatsoever on Western Shoshone title or possessory rights, and would be for the purpose of enforcing the Treaty of Ruby Valley. Duckwater Memorandum, supra, at 24-52.

In 1962, the ICC decided that the Western Shoshone lands were taken at some time in the past.[7/] On February 11, 1966,

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[7/] The Court of Claims has conceded, however, that the ICC was "unable to discover any formal extinguishment" of the Western Shoshone title, and could not establish a date of taking. Stay Petition Opinion, supra, 996.

the Indian Claims Commission approved a stipulation between the parties to value the Western Shoshone lands for purposes of compensation as of July 1, 1872.

On November 10, 1976, the Temoak Bands Council passed a resolution stating that it never had an opportunity to choose between "including lands in the claim and attempting to assert title to said lands,". Res.Br.App. F at F2.

On November 14, 1976, the Temoak Bands Council adopted a Resolution terminating their claims attorney contract. Res.Br.App. G.

Although it was named as the representative of the "Western Shoshone Identifiable Group" in the Docket 326-K proceedings, the Temoak Bands Council never controlled that litigation.[8/]

[8/] The efforts of the Temoak Bands Council to take control of the case, and stay the proceedings pending a genuine determination of title resulted, in effect, in the Temoak Bands being fired as

(Continued on next page)

Initially, the Temoak Bands Council was misinformed about the nature of Docket 326-K. After 1965, when the "Western Shoshone Claims Committee" was created, the claims attorneys ceased to communicate with their client, the Temoak Bands. In a January 19, 1977 letter to the Interior Secretary, Leslie Blossom, Temoak Bands Chairman, stated:

> There are many strange things about the way these lawyers have operated. They no longer report to us but to a "claims committee" which was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the lands we still have, but have fought our people who have tried to do it themselves through the Western Shoshone Legal Defense and Education Association.
>
> We have now fired these lawyers and are looking for a replacement.

(Continued from previous page)

plaintiff. In The Te-moak Band of Western Shoshone Indians, Nevada v. the United States and the Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Indians, Nevada, 593 F.2d 994, cert. denied, 444 U.S. 973 (1979), the Temoak Bands finds itself both plaintiff and defendant. 652 F.2d 41, 45-46.

Western Shoshone Identifiable Group v. United States, 652 F.2d 41, 45 (Ct. Cl. 1981). The attorneys refused, however, to be terminated, and prosecuted the claim to judgment with no client.[9/]

Three attempts have been made to call the attention of the Court of Claims to the fundamentally erroneous premise of extinguishment on which Docket 326-K proceeded, and to the egregious due process problems which pervaded Docket 326-K. These were the 1974 Motion of the Western Shoshone Legal Defense and Education Association for a stay, which was denied by the ICC and the Court of Claims, 35 ICC 457 (1975), 531 F.2d 495 (Ct. Cl. 1976), cert. denied, 429 U.S. 885 (1976); the several motions of the Temoak

9/ Although the attorney purported by then to be representing the "Western Shoshone Claims Committee", his contract had always been with the Temoak Bands Council. No other contract was ever approved by the Interior Secretary as required by 25 U.S.C. Sections 70n and 81.

Bands for a stay of Docket 326-K filed in 1976 and 1977, likewise denied by the ICC and the Court of Claims, 40 Ind. Cl. Comm. 304 (1977), 593 F.2d 994 (Ct. Cl. 1979), cert. denied, 444 U.S. 973; and the filing by the Duckwater Shoshone Tribe, et al. in opposition to the claims attorneys' petition for fees, also denied by the Court of Claims. 652 F.2d 41 (Ct. Cl. 1981).

Western Shoshone opposition to Docket 326-K has grown steadily from 1951 on. Today, all Western Shoshone tribal governments and political entities are united in the position that title to Western Shoshone lands has never been ceded or extinguished and they retain possessory rights. This does not represent in any sense a change in position or litigation strategy. Rather, it represents full understanding by the Western Shoshones of the significance of the proceedings in Docket 326-K, a

comprehension which has developed despite decades of misinformation about the status of Western Shoshone aboriginal title and the effect of the proceedings in Docket 326-K.

SUMMARY OF ARGUMENT

1. The government's position that the Western Shoshones have been paid for their land and the Danns' possessory rights to Western Shoshone ancestral lands have been terminated pursuant to Section 22(a), the "discharge" provision of the ICCA, rests almost entirely on two propositions: 1) the "Western Shoshone identifiable group" is a "tribal entity" and 2) the "tribal entity" has been "paid" by the transfer of funds from the United States Treasury to an account managed by the Interior Department pursuant to an automatic appropriation of funds to pay the judgment in Docket 326-K.

2. The appellant's appeal must fail because the "Western Shoshone identifiable

group" is by no stretch of the imagination a "tribal entity" in the corporate sense required by the appellant's argument. Instead, the "identifiable group" is an aggregate of 9 distinct and separate federally-recognized Western Shoshone tribal governments, the Dann Band of Western Shoshone Indians (not recognized), individual unenrolled Western Shoshone Indian descendants and Western Shoshone Indian descendants enrolled in at least 12 other federally-recognized tribes. Foreclosure of the land rights of all Western Shoshones by application of Section 22 would violate the due process guarantees of the Fifth Amendment.

3. In addition, by asserting their possessory rights in defense to this ejectment action brought by the United States, the respondents are not asserting any "claims" or "demands" against the United States which can be precluded by the res judicata effect of Section 22.

4. Application of Section 22 in the manner sought by the appellant would violate the intent of Congress to give justice to American Indians by enacting the ICCA, ignore its plain meaning, read its preclusive effect overbroadly, and turn the ICCA into a means for the government to quiet otherwise unextinguished Indian title in itself.

5. The Western Shoshone Indians, including the respondents, have not been "paid" within the meaning of Section 22 where the funds in question cannot be used for their benefit without further legislation. The court of appeal's conclusion that payment does not occur until a distribution plan is in effect pursuant to the Distribution of Judgment Funds Act, 25 U.S.C. Section 1, et seq. (hereinafter DJFA), or special legislation, is correct.

6. Congress prevented the Interior Department from submitting a distribution

plan for the Western Shoshone judgment under the DJFA, and is prepared to legislate a settlement of Western Shoshone land rights. A legislative settlement is supported by the Interior Department, the Nevada Congressional Delegation, and the Nevada State Multiple Use Advisory Committee on Federal Lands.

ARGUMENT

I. INTRODUCTION

This Court observed in an earlier case involving an Indian tribe situated somewhat similarly to respondents and amicus herein; "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

Should the government prevail here, a

nation of approximately 8,000[10/] largely impoverished, poorly educated, remote desert-dwelling Indians, the Western Shoshone, will suffer the same injustice that ultimately befell the Cherokees of Georgia.

As it turns out, the job of extinguishing Indian titles and herding the Indians onto reservations was never quite completed in Nevada. Respondents herein, like other Western Shoshone bands represented by amicus, continue to live on and utilize lands identified as theirs in the 1863 Treaty of Ruby Valley, supra, in which their ancestors made valuable concessions to the United States in exchange for the assurance that they could continue peaceably to occupy their homeland.[11/] Those lands were never thereafter ceded or abandoned by the Shoshones or taken by Congress. The explicit ruling of the court below to this effect, 706 F.2d 919, 933, is nowhere questioned or challenged by the government. The United States seeks instead to present a smokescreen of hypertechnical arguments which, if successful, would lead to the absurd conclusion that Indians may be dispossessed of their property under the aegis of a congressional act meant solely to redress ancient wrongs of a similar nature.

In the long history of litigation over

10/ The precise population of the so-called "Western Shoshone identifiable group" is unknown, and will not be known until a roll has been prepared pursuant to judgment distribution legislation.

11/ This is one of many respects in which this case is utterly unlike County of Oneida v. Oneida Indian Nation, 719 F.2d 525 (2d Cir. 1983), cert. granted, ___ U.S. ___ (1984), now pending before this Court. That case concerns lands actually ceded by the Oneidas in agreements with the State of New York made nearly 200 years ago, which agreements failed to receive Congress' approval. The Oneidas have not occupied that land since 1795.

Indian aboriginal land rights, this Court has repeatedly and consistently enforced the rule that Indian title can be extinguished only by cession or abandonment by the Tribe, or by a taking explicitly authorized by Congress.[12/] The government has offered no reason why that unbroken line of decisions should be abandoned here. The bizarre facts underlying this proceeding reveal once again the need for this Court to reaffirm the fundamental principles of Indian title to prevent the Western Shoshone from losing their land in a "fine web of legal niceties." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 361 (1945) (Douglas, J. dissenting).

In its Liability Opinion, supra, n.4, at 413-414, the ICC found that the Western

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12/ See, e.g., Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R., 314 U.S. 335 (1945); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

Shoshone aboriginally used and occupied a large area of central Nevada, the northern half of which is generally coextensive with the area described in Article V of the Treaty. And as the court below held in this case, in a portion of its opinion not challenged by the government, the United States never established a reservation for the Western Shoshones in compliance with Article VI of the treaty (which, if accepted by the Indians, might have effected an extinguishment of the balance of their aboriginal lands); see United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R., supra at 353-354, nor did it do anything else to extinguish Western Shoshone aboriginal title.[13/]

13/ Amicus ALTA attempts to argue that the issue of title extinguishment was litigated and decided in the ICC and Court of Claims. This is incorrect. The main issue litigated as to the Western Shoshone was whether they could be said to have had aboriginal title to any lands at all. See, Liability Opinion, supra, n. 4, at 440-443. Both sides agreed that if they had ever had any

(Continued on next page)

Nevertheless, beginning in the early 1900's, apparently having forgotten that it had neglected to obtain any cession of the Shoshones' aboriginal land, the executive branch of the government began asserting control over those lands by designating national forests, and, after passage of the 1934 Taylor Grazing Act, 43 U.S.C. Section 315, by designating grazing districts and issuing grazing permits. No

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aboriginal title lands, their title was extinguished, though neither side could ever explain how. The Commission held, id. at 416, p. 26, that "by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands." If that is a holding of extinguishment, it has no precedent in the many decisions of this Court on the subject, see, n. 3., supra. In the Stay Petition Opinion, supra, n. 4, at 994, the Court of Claims stated squarely that "[t]he instant claim is one of many where the Commission was unable to discover any formal extinguishment of Indians' legal title, only gradual encroachments by settlers and others, and takings, the exact date of which could not be definitely set." (Emphasis added.)

one ever informed the Shoshones that the United States intended to treat their land as its own, but they gradually became aware of the increasing non-Indian presence throughout what they knew as "Te-Moak's land."[14]/

In the 1930s, various Western Shoshone bands began to seek help from attorneys to enforce their treaty.[15]/ Those early

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[14]/ Te-Moak was a principal chief of the Western Shoshones when the Treaty of Ruby Valley was signed, and he has ever since been identified with the Treaty and its designation of Shoshone lands. At hearings held in Elko, Nevada in 1932, a Western Shoshone witness, disputing that lands within the Treaty area are federal public domain, noted "...here in Temoak's territory they can't call it that." Survey of Conditions of the Indians in the United States: Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, Part 28.

[15]/ This account of the history of the Western Shoshone land claim is fully documented in the records of Docket 326-K, see, n. 4, supra, and especially in the Duckwater Memorandum, filed therein on July 15, 1980, accompanied by four volumes of documentary exhibits. A few of the most pertinent documents are reproduced as an appendix to the respondents' brief.

efforts to seek relief were unavailing. In 1947, spurred by the enactment of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 et seq. (hereinafter ICCA), the BIA called a mass meeting at Elko, Nevada where "well over a hundred" Western Shoshones heard presentations by various persons concerning a possible lawsuit against the United States. The Superintendent of the Western Shoshone Agency of the BIA described the proposed litigation by saying: "We have in mind mainly what you have coming to you under your treaty rights. The Western Shoshone Bands of Indians were promised certain things which were never given to them. That is the basis of your pending suit." Duckwater Memorandum Ex. 5 at 5-1. From this, many Western Shoshones reasonably concluded the proposed litigation was to enforce the Treaty, not abrogate it. The Shoshones were also told by an attorney from Elko,

Nevada, however, that "the lands have been taken away from you and you will never get it [sic] back. So the only thing you can do now is sue the government and get the money for the lands you lost." Duckwater Memorandum, Ex. 5 at 3.

Although the Western Shoshone then, as now, had no central organizations, and consisted of various small bands, communities, and recognized tribal governments, the BIA chose to denominate this particular assembly (which consisted of whoever had shown up in response to a public announcement) as "The General Council of the Western Bands of the Shoshone Tribe of Indians," so that when, at the conclusion of the meeting, a vote was taken to file a claim under the ICCA, that vote could be clothed with apparent formality. See Duckwater Memorandum, Ex. 5 at 5. It was, however, the Temoak Bands Council, a federation of Shoshone bands organized under the Indian Reorganization

Act, supra, who entered a contract authorizing the suit.

Even before the first opinion was issued in the case, it became apparent that there was unhappiness among the Shoshones with the assertion that the Western Shoshones no longer had any claim to their land.16/

In 1962, the ICC issued its Liability Opinion, supra, in which it described the aboriginal lands of the various Shoshone groups and how each group lost those lands. Most of the Shoshone aboriginal lands were lost, the Commission found, by an 1861 Treaty of cession or by establishment of reservations: Id. at 415-415, p. 25. As to the Western Shoshone lands in Nevada, however, the Commission could only point to "gradual encroachment by whites, settlers and others," and unspecified "acquisitions, dispositions or taking" by the United States, by which the Western Shoshone "were deprived of their land." Id. at 416, p. 26. The Commission could not, however, assign a date to this event.

The turmoil in which the litigation was embroiled thereafter, as the Western Shoshones struggled to prevent the proceedings from impairing title to their lands, is reflected in the long list of decisions rendered in Docket 326-K until its conclusion in 1981. See n.4, supra.

It is against the backdrop of the history of the litigation of Docket 326-K that the government argues that the mere appropriation of funds in response to a judgment under the ICCA, without authorization to the Interior Department pursuant to the DJFA or special

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16/ At a mass meeting in Elko on August 21, 1959, characterized as the second "regular meeting" of the General Council of the Western Bands," etc. see Duckwater Memorandum Ex. 10 at 1, considerable dissension was apparent, see Attorneys' Fees Opinion, supra, 45-47, and although the contract was renewed, the action was protested. Id; and see Res.Br.App. B.

legislation to distribute the funds for the actual benefit of benticiary Indians, invokes a broad preclusive effect of Section 22 of the ICCA.

At page 27 of its brief, the government raises the spectre that "[t]he decision of the court of appeals, . . . invites the wholesale litigation of subsisting Indian title to land where compensation has been awarded for extinguishment of that title. . . ." This is simply not true. The eminent scholar of federal Indian law, Felix S. Cohen, responded to an almost identical point in his article on original Indian title when he stated that "except for a few tracts of land in the Southwest, practically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians. 32 Minn.L.Rev. 28, 33-34 (1947). He testified before Congress that virtually all Indian title in the United States was

virtually all Indian title in the United States was transferred to the United States prior to the enactment of the ICCA.[17/] Affirmance of the lower court in the instant case does not present a wholesale threat to settled titles either of the government or private parties.

If this court reverses the lower court, certain anomalous, if not startling conclusions are unavoidable. The Danns and other Western Shoshones will be deprived of their lands as of December,

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17/ Hearings on H.R. 1198 and H.R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess. 70 (1945). The only other example known to counsel where a judgment was awarded pursuant to the ICCA, but Indian title was otherwise unextinguished, was litigated in Osceola v. Kuykendall. Memorandum Op. No. 76-492 (D.C. 1976). See Res. Br. in opposition to Petition for Writ of Certiorari, App. B. That case was a constitutional challenge to the ICCA. The government persuaded the court to dismiss for lack of a case or controversy by promising that it did not intend to intertere with plaintift Osceola's occupancy of Seminole aboriginal lands.

1979,[18] although their title remains technically and legally unextinguished. Most amazing, however, is the fact that the Shoshones will have been compensated the 1872 value of lands which the district court held were taken in December, 1979, and the court of appeals held were not taken at all.

II. The Judgment in Docket 326-K Has Not Been Paid And The Discharge Provision of Section 22(a) Has Not Been Activated

Statutes should be understood and interpreted according to their plain meaning. 73 Am. Jur. 2d, Statutes Section 206 (1974). Section 22 of the ICCA provides in relevant part:

> Payment of any claim, . . . , shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

This Court has said

> . . . payment connotes tender by the debtor with the intention to satisfy the debt coupled with its acceptance by the creditor.

United States v. Isthmian Steamship Company, 359 U.S. 314, 318-319 (1959). In this instance, the appellant, characterizing itself as a trustee, seeks to seize the Danns' land by contending that the establishment of an account under appellant's control, and requiring an Act of Congress for disposition or use by either the appellant or the respondent, constitutes payment such as to foreclose the Danns' property rights. As the government well knows, the Western Shoshones have adamantly refused payment.[19] Res.Br.App. L. There has been no tender and acceptance as required by the plain meaning of the word "payment".

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[18] The actual date of "closing" on this unusual land transaction was apparently December 19, 1979. Res.Br.App. J at J2.

[19] At the Interior Department of Hearing of Record in Elko, Nevada on July 26, 1980, for the purpose of considering a proposed distribution plan for Docket 326-K, the overwhelming majority opposed acceptance of the money.

1. The Court of Appeals concluded:

> The ordinary meaning of "payment" does not seem satisfied by a transfer of funds that leaves such significant legal blocks in the way of delivery to the payee.

706 F.2d 919, 926. Not only have the Western Shoshones not accepted or received payment, but they have no control whatsoever over the funds. Although the government claims to be acting as a trustee holding the funds for the benefit of the Western Shoshones, the Interior Secretary cannot utilize the funds in any way for their benefit. The Secretary can do more than manage the fund for interest income.20/

20/ In his concurring opinion in Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 333 (1945) Jackson, J., in describing a similar situation, and noting that "the only cash payment is attorney's fees", said that "all that is done for them [the Indians] by a judgment is to earmark some funds in the Treasury from which Congress may as it sees fit from time-to-time make appropriations...for the health, education, and industrial advancement of said Indians.... Congress, even after judgment, still must decide the amount and times of payment to the Indians according to their needs." Id. at 354.

Despite the government's characterization of the situation as one wherein a Western Shoshone tribal entity has been paid because it holds equitable title to a trust account, the situation is really more similar to an escrow. The usual definition of an escrow is a written instrument (in this case money) which is deposited by the grantor, promissor, or obligor, with a third party, to be kept until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee or obligee. 28 Am. Jur. 2nd Escrow Section 1 (1966). Neither the grantor nor the grantee can actually do anything with the fund. In this instance, the contingency is the enactment by Congress of legislative direction for the distribution of the fund.

Not only does Congress retain "significant control" until a distribution scheme is put into effect, as noted by the

court of appeals, 706 F.2d 919, 926, but the Interior Secretary cannot actually utilize the funds in any way for the benefit of the Western Shoshones. Since the deadline for the Interior Department to submit a distribution plan to Congress pursuant to the DJFA has run (Res. Br. App. M), legislation will be required before anything can be done with the fund other than invest it at interest. Congress has, in fact, refused to waive its right to provide such legislative direction, id., on the express grounds that its further review of questions concerning title is required. That action implicitly rejects the notion that payment has been accomplished and the government's obligations discharged.

2. This court should reject the government's highly contrived argument on the payment issue in favor of a reasonable interpretation of when "payment" occurs. In United States v. Consolidated Edison Company, 366 U.S. 380, 391 (1961) the Court stated:

> Payment is not a talismanic word. It may have many meanings depending on the sense and the context in which it is used. Payment may constitute a capital expenditure, an exchange of assets, a pre-paid expense, a deposit or a current expense, and when the exact nature of the payment is not immediately ascertainable because it depends on some future event such as the outcome of litigation, its treatment for income tax purposes must await that event.

In the instant case, the government's argument that payment occurred upon the automatic appropriation of the Docket 326-K judgment fund is simply unreasonable. The court of appeals view that payment occurs when Congress permits a distribution plan to become effective pursuant to the DJFA or has legislated one, as is required here, is overwhelmingly the better view of the interpretation and application of Section 22(a).

3. In its brief the government has focused on the court of appeals' suggestion that the results of the Dann

litigation with respect to the issue of extinguishment of title might be informative to Congress in the legislative process, and attacks it on the ground that a "final look" at the circumstances of the Western Shoshone claim is prohibited by the legislative history of the ICCA. App.Br. 33. Actually, while the court of appeals does note that the outcome of this litigation might be informative to Congress in the upcoming legislative process, the court's conclusion that payment has not occurred is definitely based on other reasoning. The reasons are stated in the paragraph of the opinion which immediately follows that conclusion. They are: 1) "no monies have actually passed into the hands of the Western Shoshone group or its members, nor has any been used for their benefit"; 2) "distribution can only occur pursuant to a plan submitted by the Secretary of the Interior and accepted by Congress under 25

U.S.C. Sections 1401-07, or by separate legislation"; 3) "Congress therefore retains significant control over the claims process until a distribution scheme is actually put into effect"; 4) "the ordinary meaning of 'payment' does not seem satisfied by a transfer of funds that leaves such significant legal blocks in the way of delivery to the payee" and 5) "other reasons hav[ing] to do with the interpretation of Section 70u offered by the court of claims in Western Shoshone Legal Defense & Education Association v. United States, 531 F.2d 495 (Ct. Cl. 1976)." 706 F.2d 919, 926

4. The last point is significant. In the WSLDEA Intervention Opinion, supra, 503 n.16, the Court stated:

> If the majority of the identifiable group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award.

Id. at 503. In the Stay Petition Opinion,

supra, the court further stated:

> As regards the fear of the intervenors that they might lose the right to claim title if the case proceeded to final judgment, we pointed out that by Section 22 of the Act, . . . , the United States would not be discharged of any claim, including one that the Western Shoshones owned the land, until the judgment was reported to Congress, money to pay it appropriated, and payment made.

Id. at 997.

> The matter is somewhat changed since the Western Shoshone footnote because Congress can longer stop the payment and defer the extinguishment of the title claim, just by not appropriating. By recent enactments,...., Congress has amended the old standing appropriation to pay Court of Claims' judgments,..., to make it available for Indian Claims Commission judgments,.... Thus it looks as if the Temoaks would have to get Congress to act affirmatively.

Id. at 999. The court of appeals concluded that its analysis of the payment issue is consistent with that of the Court of Claims. The government attacks this conclusion by contending that in the language last quoted the Court of Claims meant that Congress must enact legislation to avert the effect of Section 22. App.Br. 46 n. 25.

The government is simply trying to avoid the fact that the opinion of the Court of Claims, and the opinion of the court of appeals, are consistent. In its 1979 opinion, the Court of Claims did not say that Congress would have to enact legislation to avoid preclusion of the title claim by Section 22(a). The Court simply said that Congress would have to act affirmatively. Congress did act affirmatively.

On June 20, 1980, the Interior Department asked the Senate Select Committee on Indian Affairs for an extension of time to submit a Secretarial plan for distribution of the Docket 326-K fund. Res.Br.App. K. This extension was essential for the Interior Department to meet the deadline imposed by the DJFA. On July 31, 1980, the Western Shoshones asked the Senate Select Committee to deny the requested extension. App.Br.App. L. On August 4, 1980, the Committee denied the

extension, citing the fact that "a significant number of Western Shoshone people oppose acceptance of the award at this time" (emphasis supplied), and noting that "the outcome of [the Dann] case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue." Res.Br.App. M at M2. In the view of the Senate Committee, it was obviously unnecessary for Congress to enact legislation to avoid any impact of Section 22(a) on Western Shoshone title which might arise if "payment" were effected. Congress had only to prevent the adoption of a distribution plan under the DJFA to prevent "final payment".21/

21/ In its Stay Petition Opinion, supra, 999, the Court of Claims said: "If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress as recommended in Western Shoshone, 531 F.2d at 503, n. 16...." (emphasis supplied). By using

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The Western Shoshones did exactly what the Court of Claims instructed them to do. They persuaded Congress to take affirmative action to prevent "final payment".22/

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the words "final payment", the Court of Claims evidently contemplated that if the automatic appropriation constituted payment in any sense, it was not "final payment", and further action was required.

22/ In fact, Western Shoshones have done everything in their power from the time of the Treaty of Ruby Valley to the present to prevent the extinguishment of their title. They have continuously insisted that they own the land and are in possession of it. Res.Br.App. C at C2-C5; F at F4; G at G1; H at H6-H7; I at I3-I4 and I7-I8; J at J4-J7; L at L2. They attempted to intervene in the ICC proceedings as soon as they understood its potential consequences. WSLDEA Intervention Opinion, supra. When that attempt failed, they persuaded the Temoak Bands Council to attempt to stay the proceedings. Stay Petition Opinion, supra. When that attempt failed, they persuaded Congress to stop the proceedings short of payment. Res.Br.App. M. Having successfully taken the Western Shoshone title to the very edge of the precipice, the government now seeks to administer the coup de grace by its contrived analysis of Section 22(a) and the payment issue.

5. Hitherto, the courts have always left it to Congress to effect the extinguishment of Indian titles. Never before has a court ordered the eviction of Indians from their aboriginal homelands. Here, the government is asking this court to undertake what will be in effect a judicial extinguishment. This court has previously said, however, that

> an extinguishment cannot be lightly implied in view of the avowed solicitude of the federal government for the welfare of its Indian wards.

United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1941).

Congress has always dealt squarely with unextinguished Indian title. The aboriginal title of Alaskan natives was extinguished by the Alaskan Native Claims Settlement Act of 1971, 85 Stat. 688. The unextinguished aboriginal title of the Passamoquoddy and the Penobscot Indians was extinguished by the Maine Indian Claims Settlement Act of 1982. 94 Stat.

1785. Never before has the United States effected extinguishment of Indian title by such devious means.

6. Payment requires tender and acceptance. Here, the government purports, on the one hand, to have made payment as a judgment debtor, and on the other, to have accepted payment as the Western Shoshones' trustee. The government was well aware at the time of its alleged acceptance of payment as the trustee that the TeMoak Bands Council, as the "exclusive representative" of the beneficiary Western Shoshones, was adamantly opposed to acceptance of the money because of its apparently well-founded concern that acceptance might impair Western Shoshone land rights. Such deliberate action by the trustee with the intent to take advantage of the beneficiary is unlawful. Restatement 2d Trusts, Section 170. If this court finds that the discharge provision of Section

22(a) was triggered by the acceptance of such "payment" by the trustee to the detriment of the Western Shoshones, the Shoshones may initiate an action to set aside the actions of the trustee. See Restatement 2d Trusts, Sections 170, 208; Scott, The Law of Trusts, Section 208.4 (1967); Michoud v. Girod, 2 Johns.Ch. 252 (N.Y. 1816).

III. Section 22(a) Estops Only Money Claims Against The United States

1. The Dann sisters are not making a claim for money or any other relief against the United States. The government has filed a trespass and ejectment action against them. The government does not dispute, however, that the Danns and their ancestors have occupied ancestral Western Shoshone homelands which they now occupy since time immemorial. In Osceola vs. Kuykendall, supra, the court held that the plaintiff had no claim against the United States while he was in possession of the

property involved. Brief of Respondents in Opposition App. B at 13.

2. Congress created the ICC to eradicate the stain on the national honor caused by unfair dealings with Indian tribes. H.R.Rep. No. 1466, 79th Cong., 1st Sess. 5, 8 (1945); 92 Cong. Rec. 5318 (May 20, 1946) (remarks of Rep. Stigler). The Act was intended to provide Indians with a forum for claims against the United States for money damages arising out of "ancient wrongs". Stay Petition Opinion, supra at 998. The Act was not intended to extinguish otherwise unextinguished Indian titles. Billie v. Seminole Indians, 146 F.Supp. 459 (Ct.Cl. 1956), cert. denied, 355 U.S. 843 (1957); Hearings on H.R. 1198 and H.R. 1341 Before the House Committee on Indian Affairs, 79th Cong., 1st Sess. 78 (1945). In fact, the Commission did not have jurisdiction to adjudicate Indian titles or to return Indian lands. 92 Cong.Rec. A4923 (1946). Osage Nation v.

United States, 1 ICC 54, 65 (1948).

Nothing in the legislative history of the ICCA indicates that Congress intended that the Act be used as an engine of extinguishment of otherwise unextinguished Indian titles, or to quiet title to Indian lands in the United States. Had Congress intended this result, Congress could have provided for it in the Act.

3. The discharge provision of Section 22(a) cannot be broader than the jurisdiction of the ICC. The fundamental notion of res judicata is to promote judicial efficiency by prohibiting the relitigation of causes of action which have already been finally decided by a court of competent jurisdiction. It does not follow that a legal right which was not, and could not have been, litigated before the ICC can be precluded by payment of a judgment rendered under the Act.

If common law principles of res judicata apply in interpreting Section 22,

as the government has contended, the discharge provision of Section 22(a) would not foreclose the Danns' possessory title. It is a fundamental principle of res judicata that when the claim of the second suit is one which could not have been entertained in the prior suit, res judicata has no force and effect. Lower Sioux Indian Community in Minnesota v. United States, 626 F.2d 828 (Ct. Cl. 1980); The Creek Nation, 168 Ct.Cl. 483 (1964). Jurisdiction did not exist in the ICC for the Danns to assert Western Shoshone ownership and occupancy of lands. Common law res judicata would therefore not preclude their occupancy now.

The word "claim" as used in Section 22(a) must be construed in terms of the whole statute and its purposes. United States v. John C. Grimberg Co., Inc., 702 F.2d 1362 (Fed. Cir. 1983). In the context of the ICCA, "claim" must mean a claim against the United States based on

the liability of the United States for money damages. The ICCA was clearly concerned only with claims against the United States based on the government's liability for money damages. In interpreting "claim" in another context, the Supreme Court stated that a claim against the United States means a claim based on government liability. United States v. Cohn, 270 U.S. 339 (1926).

The word "claims" as used in the ICCA necessarily refers to claims based on government liability. Section 22(a) states that payment shall be a "full discharge" of the United States of all claims and demands. "Discharge" is only an appropriate term if Congress was referring to claims based on government liability. When no obligation on the part of the government is claimed, there is nothing to discharge. The legislative history cited in Klamath and Modoc Tribes v. United States, 174 Ct.Cl. 483 (1966),

demonstrates that the jurisdiction of the ICC was meant to cover various obligations which the United States assumed, or should have assumed, and to provide adjudication of misappropriations of Indian funds or property. Id. at 488-89 citing 92 Cong. Rec. 5312-5313 (1946). The House Report states that without the Act the government would fail to meet its obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated. H.R. Rep. No. 1466, 79th Cong. 1st Sess. at 5. The Report states again that the concern is for enforcement of obligations that the federal government freely assumed. Id at 9. In passing the ICCA, Congress clearly did not intend to provide for adjudication of Indian titles.

IV. The Application of Section 22 to Foreclose Indian Land Rights Violates the Right to Due Process.

The appellant attempts to escape the problems with its position in this case by

contending, simply, that the Docket 326-K judgment has been paid to appellant, as trustee, on behalf of a "tribal entity" called the "Western Shoshone identifiable group". The so-called "identifiable group" consists of many tribal entities with Western Shoshone membership and political control over such membership, and Western Shoshone descendants who are not members of any tribal entity. See n. 2, supra.

The ICC has defined "identifiable group" as follows:

> If a group of village entities speak the same dialect, move about more or less together in search of subsistence and retain a hold on the same general area of land for their homes ... they should be considered an entity capable of prosecuting a claim and establishing their right thereto as a[n] [identifiable] group.

Lummi Tribe v. United States, 5 ICC 525, 546, (1957), quoted in Confederated Tribes of the Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 206 n. 21 (1966). While such an entity may be an adequate

representative of all of its constituent elements for due process purposes under certain circumstances, it is not adequate where, as here, the interests of its "members" may be radically divergent.

The Western Shoshone ancestral lands are a collective asset: however, there is no single tribal government or corporate authority which has control of either the asset or the Western Shoshone membership. The application of Section 22 to foreclose all Western Shoshones from exercising their land rights, as requested by the government, would constitute an egregious violation of the right of Western Shoshones to due process of law as guaranteed by the Fifth Amendment.

Section 10 of the ICCA provides in relevant part:

> Any claim within the provisions of this chapter may be presented to the Commission...; ...wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of

representing such Indians,....

60 Stat. 1052 (1946).

The ICC found that the Temoak Bands had the "capacity" to maintain an action "on behalf of the Western Bands of the Shoshone Nation of Indians," 11 ICC 387, 388. The Court of Claims, citing the ICC, found that the Temoak Bands "has the right to maintain this action for and on behalf of the aboriginal Western Shoshone identifiable group, ...," and implied that the Temoak Bands were the "exclusive representative" 351 F.2d 495, 499. The ICC did not find, however, that the Temoak Bands had the right to be the "exclusive representative" of all Western Shoshones within the meaning of Section 10, and the Court of Claims did not discuss the issue. In fact, under the plain meaning of the statute, the Temoak Bands, as a "tribal organization ... recognized by the Secretary of the Interior as having authority to represent such tribe ..." had

"the exclusive privilege of representing" only Western Shoshones enrolled in the Temoak Bands Tribe. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935,954 (1974).

Other federally-recognized Western Shoshone tribal entities, particularly the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe and the Ely Colony Council, likewise had the "exclusive privilege" of representing their enrolled membership.

Section 22 must be interpreted and applied by this court in such a manner as not to violate the Fifth Amendment, and in such a way as to preserve its constitutionality. St. Martin Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1980). The application of Section 22 to estop the exercise of Western Shoshone land rights would violate the right of Western Shoshones and their tribal governments to due process of law, because they were not adequately represented in

the Docket 326-K proceedings according to the due process standards established by this court in Hansberry v. Lee, 311 U.S. 32 (1940).

The issue in Hansberry, as here, was whether res judicata should be invoked to bar the defense of parties who were allegedly members of a class represented in earlier litigation.

The Hansberry court found that res judicata could not bar a defense against enforcement of a restrictive covenant on real estate where the defendants were alleged to be members of a class which was represented in previous litigation of the same claim, but where it was obvious that some members of the alleged class had an interest in enforcing the agreement, while others did not. The court found there was no common interest of the class in litigation, and the interests of the class representatives were not necessarily, or even probably, the same as those said to

be represented.

The situation in the case at bar is very similar to that in Hansberry. So long as it could be assumed that all that was at issue was a claim against the United States under the ICCA for money damages for an "ancient wrong" within the jurisdiction of the ICC, the interests of the "Western Shoshone identifiable group" were common and any Western Shoshone or Western Shoshone entity could be an adequate representative for due process purposes.

This would also be true if the representative were suing on behalf of all Western Shoshones to quiet title. In either instance, the plaintiff can be an adequate representative because the interests of all potential parties are the same. Where, however, some parties seek compensation for an extinguishment of title which didn't actually occur, and payment of the judgment will impair the

rights of other parties to occupy the land, there is obviously no common interest. In fact, a probable majority of the "Western Shoshone identifiable group" have wanted only to assert their aboriginal and treaty title from the very genesis of the idea of a claim against the United States. Res. Br. App. H at H-7; Rusco, The Organization of the Temoak Bands, XXV Nevada Historical Soc. Q. 175 (Fall, 1982) (Lodged with Clerk) Neither the Temoak Bands, nor anyone else, could be an adequate representative of all Western Shoshones and Shoshone land-using entities for purposes of due process under these circumstances.

Section 10 of the ICCA did not by its language preclude the participation of other federally-recognized Western Shoshone tribes in the Docket 326-K proceedings. At the very least, the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe and the Ely Colony Council

had the statutory right to separately represent their membership. 23/

The preclusive application of Section 22 which the Government seeks here would violate the right of Western Shoshones to due process and render the ICCA unconstitutional.

V. Congress Will Resolve Western Shoshone Land Issues

At the time of the final judgment of the Court of Claims in Docket 326-K, the DJFA required that the Interior Secretary submit a plan to Congress for distribution of the fund within 180 days after appropriation of the fund, or submit proposed legislation. 25 U.S.C. Section 1402(b) allows the Secretary to obtain a

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23/ In the Attorney's Fees Opinion, supra, the Court of Claims noted that the Duckwater Shoshone Tribe was never a party to the Docket 326-K proceedings. 652 F.2d 41, 43 (1981).

maximum 90-day extension to submit a plan or proposed legislation by request to the Senate and House of Representatives Committees on Interior and Insular Affairs. When the Secretary requested an extension in Docket 326-K, it was denied in language implicitly indicating Congress' view that payment should await further deliberation by Congress. Res.Br.App. M.

The Senate Report on the 1982 amendments to the DJFA identifies the judgment as requiring legislation. S.Rep. 97-658, 97th Cong., 2d Sess. 3 (1982). The criteria applied to identify the Western Shoshone judgment as requiring legislation included strong feelings among Western Shoshones that there should be a land settlement.

The Senate Select Committee on Indian Affairs, in rejecting the extension sought

by the Interior Department to submit a distribution plan, indicated its understanding that denial of the extension would necessitate legislation, and its willingness to address the issues presented by the Dann case in such legislation. Res.Br.App. N.

The Interior Department has likewise stated its belief that legislation involving land, as well as the distribution of the judgment fund, is appropriate in the Western Shoshone situation. Brief of Amicus Western Shoshone National Council in Opposition to Petition for Writ of Certiorari, App. B. The Interior Department has expressly agreed to negotiate with the Western Shoshones for an appropriate legislative settlement, and has recognized the Western Shoshone National Council as the appropriate Western Shoshone negotiating

entity. Res.Br.App. P.

Senator Paul Laxalt of Nevada has concurred that "legislation will be required incorporating an overall agreement with respect to Western Shoshone land rights and to pay the award." Res.Br.App. O.

Lastly, the Nevada State Multiple Use Advisory Committee on Federal Lands, which includes virtually all organizations in Nevada concerned with the use of federal lands, has endorsed a negotiated settlement of Western Shoshone land rights issues. Res.Br.App. U.

There is no doubt that Congress, in the exercise of its broad powers to legislate with respect to Indian property and affairs, plans to legislate a resolution of the Western Shoshone land issues, and can tailor a solution to best

meet the needs of all affected parties.[24]/

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[24]/ Examples of legislative solutions include the Alaska Native Claims Settlement Act of 1971, 85 Stat. 688; the Maine Indian Claims Settlement Act of 1980, 94 Stat. 1785; the Mashantucket and Pequot Indian Claims Settlement Act of 1983, 97 Stat. 851; and the Rhode Island Indian Claims Settlement Act of 1978, 92 Stat. 813. The capacity of Congress to respond equitably when this Court sustains the legal rights of Indians to their lands is well illustrated by enactment of the Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636. That legislation responded to the principled decision in United States v. Sandoval, 231 U.S. 28 (1913), which held that the Pueblo Indian tribes were subject to the protections of federal law, thus overturning United States v. Joseph, 94 U.S. 614 (1877), and implicitly invalidating thousands of land titles. See also United States v. Candelaria, 271 U.S. 432 (1926). The Court is here confronted by a significantly less complicated situation than it faced in Sandoval; namely, neither Congress nor the Courts have ever acted to place Western Shoshone lands beyond the protection of federal law.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted this 20th day of August, 1984.

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REPLY

BRIEF

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No. 83-1476

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MARY DANN AND CARRIE DANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents' central submission is novel: "The question presented, whether payment has occurred," should "not be answered by the Court" (Br. 25). Consistent with this diversionary threshold suggestion, respondents' contentions are largely devoted to issues other than the one decided by the court of appeals and presented for review in the certiorari petition. See Resp. Br. 25-38. The arguments of the amici curiae likewise are devoted almost exclusively to matters other than the question presented in this case. See Indian Law Resource Center (ILRC) Br. 5-17; Western Shoshone National Council (WSNC) Br. 17-30, 44-61. The issues that respondents prefer to address generally were not presented to the court of appeals, were not decided by that court, and are not open for decision here. Moreover, many of respondents' collateral contentions suffer from the same impediment as their central claim that the Western Shoshone Indians retain unextinguished aboriginal title to the lands at issue in this ejectment action: they seek

reexamination of questions resolved by entry and payment of the final judgment of the Indian Claims Commission. Thus, consideration of these collateral contentions would be foreclosed even if they were properly presented here. In any event respondents' arguments are meritless.

In order to restore the case to its proper focus, we first address the various matters thrown up by respondents and the amici as obstacles to a decision on the merits. See pages 2-16, *infra*. We then turn to the respondent's argument on the question actually presented for decision: whether appropriation of moneys into a special trust account for the Western Shoshones' benefit constituted "payment" of their tribal claim.

A. Collateral Issues Interjected By Respondents And Amici

1. *The reach of the payment bar of Section 22(a)*—It is undisputed that the Indian Claims Commission's judgment awarded compensation to the Western Shoshones for the extinguishment of their aboriginal title to lands that include the eight sections at issue in this ejectment action. See Resp. Br. 10. Yet respondents and the amici assert (Resp. Br. 25-29; WSNC Br. 44-49; ILRC Br. 5-10) that even if, as we contend, Congress has paid the judgment of the Indian Claims Commission that was premised on a prior extinguishment of Indian title, persons claiming the benefit of Western Shoshone tribal rights remain free to assert in collateral litigation that the Western Shoshones retain aboriginal title to the very lands for which compensation has been paid.

a. We note, initially, that respondents' contention is contrary to the understanding of the court of appeals. The court of appeals plainly understood that, upon payment of the claims award, the defense to ejectment of subsisting Shoshone aboriginal title would be barred. The court of appeals stated explicitly that, under its interpretation of Section 22(a), Congress remained free to "invoke the bar of section [22(a)] by allowing a plan of use or distribution to take effect or legislating one" (Pet.

App. 16a). Moreover, the court of appeals explained that, under its view of the law, the Western Shoshones could, if they persuaded Congress to withhold distribution of their judgment funds, "avert loss of existing title" (Pet. App. 15a).[1]

b. In any event, respondents' contention—that, notwithstanding payment of a claim for extinguishment of

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[1] Any doubt as to the court of appeals' view is foreclosed by its approving citation to *United States* v. *Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), cert. denied, 429 U.S. 982 (1976), which was described as holding that "payment of a claim [under the Indian Claims Commission Act] remove[s] any ambiguity that title ha[s] previously been extinguished" (Pet. App. 11a). In *Gemmill* the court of appeals held that payment of a compensation claim based on extinguishment of aboriginal title barred a defense of subsisting Indian title in a prosecution for theft of government property based upon unauthorized cutting of Christmas trees from national forest lands. See 535 F.2d at 1146-1149. See also *Oglala Sioux Tribe* v. *Homestake Mining Co.*, 722 F.2d 1407, 1413-1414 (8th Cir. 1983).

Indeed, respondents' own position on this issue in the courts below is rather unclear. Although respondents asserted, in their opening brief (at 32) that they "are not making any 'claim or demand against the United States' in this case," they also told the court of appeals that payment "may have significance under the bar provision of the Indian Claims Commission Act 25 U.S.C. 70(u)" (Motion for Remand 4)—the very provision upon which we now rely. We note that the respondents, through the Western Shoshone Legal Defense and Education Association (WSLDEA), have previously suggested in this Court that payment of the claims award in this case would trigger application of Section 22(a) in this case. See Pet. at 6-7 & n.6, *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, No. 76-90; Amicus Br. of WSLDEA, Mary Dann and Carrie Dann at 6 n.7, *Western Shoshone Identifiable Group* v. *United States*, No. 79-340.

Respondents' apparent suggestion (Br. 24) that the court of appeals reserved the question whether the Dann's defense of subsisting Shoshone title could be foreclosed by the claims award is unfounded. The question reserved by the court of appeals (Pet. App. 9a n.4) is a different one, relating only to the government's separate contention (which is not before this Court) that the Danns' defense is barred by common law res judicata (claim preclusion).

aboriginal title, that title may be asserted in subsequent litigation—is plainly incorrect. This contention is advanced in several different forms.

Respondents and the amici first assert broadly that to bar an assertion of Western Shoshone title in an ejectment action such as this is to empower "the judicial branch to seize Indian land in the first instance" (Resp. Br. 27; see also ILRC Br. 5-8; WSNC Br. 29-30). Respondent's impassioned rhetoric cloaks a fallacious argument. The fundamental premise of the Indian Claims Commission's judgment is, of course, that aboriginal title to the Western Shoshone lands for which compensation was sought had been extinguished, see U.S. Br. 6-8; moreover, both the Commission and the Court of Claims have repeatedly reaffirmed that the Commission had decided, on the basis of relevant evidence, that Western Shoshone title had been extinguished. See U.S. Br. 8-9, 13 n.8. To afford preclusive effect to the discharged judgment in the Claims proceedings pursuant to Section 22(a) of the Indian Claims Commission Act accordingly cannot, by any stretch of the imagination, be deemed judicial extinguishment of a valid subsisting title. Rather, it is to recognize that the issue of extinguishment has already been determined and cannot be relitigated in this action.

To be sure, respondents challenge the premise upon which the Indian Claims Commission proceedings were initiated and maintained, and assert that the Commission's judgment rests upon an erroneous foundation. But respondents' disagreement with the judgment of the Claims Commission and subsidiary findings of the Commission and the Court of Claims does not permit them to disregard that judgment and those findings. It is the ordinary consequence of operation of a rule of preclusion, after all, that a prior judgment or finding is accorded finality in other proceedings without regard to the second court's view of the merits of the initial adjudication. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Thus, contrary to respondents' suggestion (Br. 27 (emphasis omitted)), this case is not distinguishable from one in which an Indian tribal entity seeks "the return of property taken before 1946." Indeed, for purposes of application of Section 22(a), this is precisely such a case.

c. Respondents' remaining arguments that Section 22(a) is inapplicable in this action for ejectment are: (i) that the statute's preclusive effect extends only to claims for money damages and (ii) that the statute is inapplicable because Western Shoshone title is asserted here as a defense, rather than affirmatively as a theory of recovery. See Resp. Br. 26-27; see also WSNC Br. 44-49, ILRC Br. 8-10. These arguments cannot withstand scrutiny.

i. Respondents assert that because only money damages claims could be maintained under the Indian Claims Commission Act, the discharge provided by Section 22(a) upon payment is similarly limited to claims for money damages. This contention is belied by the plain language of Section 22(a):

> The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of *all claims and demands touching any of the matters involved in the controversy.* [Emphasis added.]

The discharge granted is not limited to monetary claims; nor is it limited to actions upon the "same claim" as that previously adjudicated (see page 3 note 1, *supra*). Rather the discharge is given sweeping scope and is defined in a non-technical manner that obviates consideration of the artificial distinctions respondents posit: upon payment of a claim each and every "claim" or "demand" that touches upon the subject matter of the claims proceeding is foreclosed. *Temoak Band of Western Shoshone Indians* v. *United States*, 593 F.2d 994, 998 (Ct. Cl. 1979).

There is no evidence, moreover, that Congress intended to limit the reach of Section 22(a) as respondents sug-

gest, thereby deviating from the usual rules as to the reach of preclusion at common law (see pages 7 & note 3, *infra*). On the contrary, respondents' narrow reading of Section 22(a) is inconsistent with the purpose of that provision and of the Indian Claims Commission Act as a whole reflected by the legislative history: "to dispose of the Indian claims problem with finality" (H.R. Rep. 1466, 79th Cong., 1st Sess. 10 (1945)). See *Temoak Band of Western Shoshone Indians*, 593 F.2d at 998 (quoted in U.S. Br. 36). As respondents concede, the implication of their position is that the claims proceedings, concluded in 1979 after 28 years of litigation, should now be reopened (Resp. Br. 27).[2]

ii. It is also irrelevant, in applying Section 22(a), that the government is the plaintiff in this ejectment action and that respondents accordingly raised what they have consistently characterized as "an assertion of Western Shoshone title" (Br. 1; Br. in Opp. 2; see also U.S. Br.

[2] Contrary to respondent's contention (Br. 28-29), *Osceola* v. *Kuykendall*, 4 Indian L. Rep. F-80 (D.D.C. 1977) (reproduced at Br. in Opp. App. 3-17), does not support its interpretation of Section 22(a). The decision of the three-judge court cited by respondents does not even mention Section 22(a). To be sure, the district court ultimately held that no imminent threat to Osceola's claim of subsisting title was posed by the claims proceeding maintained by the Seminole Tribe. As respondents appear to acknowledge (Br. 28, 37 n.39), however, Osceola's claim was that he had *individual* title to the lands that were covered by the claims judgment, a title that was in any event distinct from the tribal title at issue in the claims proceeding. See Br. in Opp. App. 14-16. As we read its decision—admittedly less than a model of clarity—the district court simply held that a claim of title independent of the tribal title that was at issue of the claims proceedings could not be adversely affected by the judgment in those proceedings (Br. in Opp. App. 5-6, 16). There is no foundation for the suggestion that the government's position here is inconsistent with its position in *Osceola*. The government's argument in *Osceola* was clear: "The crucial distinction here is between [Osceola's] claim of an individual right and the [claims] petitioner's claim of a tribal right" (Defendants' Memorandum in Support of Their Motion to Dismiss at 14, *Osceola* v. *Kuykendall*, Civ. No. 76-0492).

4) in a defensive posture. In practical effect, respondents' assertion of title is indisputably a demand touching upon the subject matter of the claims proceeding. Significantly—with the exception of certain special limitations applicable in non-mutual settings—the common law doctrine of issue preclusion applies without distinction to both plaintiffs and defendants. See, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.4 (1979); Restatement (Second) of Judgments § 27 comment a (1982). Absent any affirmative indication that Congress intended a different rule here, no such interpretation of Section 22 should be adopted. It is wholly improbable that Congress intended to consign Western Shoshone aboriginal title to a shadowy half-existence in which tribal title could never be vindicated by the tribe suing as a plaintiff, but could always be asserted as a defense to any conflicting claim of title.[3]

Moreover, a rule limiting the preclusive effect of a final, paid judgment to contentions advanced in litigation by a plaintiff cannot be reconciled with the purposes of Section 22 (see page 6, *supra*) or those of the preclusion doctrines generally. The policies underlying res judicata and collateral estoppel—protection of parties from the expense and vexation of multiple litigation, regard for judicial economy, and minimizing the possibility of inconsistent decisions (see *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979))—argue against any such artificial reading of Section 22. The court of appeals' opinion laboriously reassessing the question of extinguishment (Pet. App. 16a-28a) graphically illustrates the incon-

[3] Indeed, because it diverges from collateral estoppel doctrine, respondents' interpretation of Section 22 would yield paradoxical results. Because of the court of appeals' ruling on the extinguishment issue, in any future litigation by the Western Shoshones against the United States concerning the sections of land here in issue the United States could arguably be barred by collateral estoppel from arguing that aboriginal title had been extinguished; the Western Shoshones would be barred by Section 22 from claiming that their title survives.

sistency between the preclusion policies underlying Section 22 and the rule advocated by respondents.[4]

2. *The Alleged Denial of Due Process*—Respondents and the amici next contend that application of Section 22(a) so as to bar their assertion of subsisting Western Shoshone aboriginal title would effect a denial of due process of law. Resp. Br. 29-33; WSNC Br. 49-57; ILRC Br. 10-17. They claim that neither the Western Shoshone generally, nor the respondents in particular, were adequately represented in the claims proceedings and accordingly may not be bound thereby. The court of appeals did not consider this issue, and could not have done so, for it was not raised below. Consideration in this Court accordingly is inappropriate. See, *e.g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5] The due process contentions raised for the first time in this Court are in any event without merit.

a. As explained in our opening brief (at 27-29 & n.15) the claim that was the subject of the proceedings before the Commission was a collective tribal claim, not an aggregation of related individual claims on behalf of a class of similarly situated persons. Thus arguments

[4] We note that the implications of respondents' argument are not limited to the preclusive effect of Indian Claims Commission proceedings. Under the same rationale, a party could recover compensation in the Claims Court under the Tucker Act for the "inverse condemnation" of his property amounting to the taking of the entire fee, and yet remain free, notwithstanding the preclusive effect of payment of the award under 28 U.S.C. 2517(b), to defend a subsequent ejectment action by the government on the ground that it retained unencumbered title to the property. Section 2517(b) provides in pertinent part that "[p]ayment of any * * * judgment [of the Claims Court against the United States] * * * shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy." (An earlier version of Section 2517(b), 36 Stat. 1141, 31 U.S.C. (1946 ed.) 225, apparently provided the model for Section 22(a) of the Indian Claims Commission Act.)

[5] Respondents do not claim that they raised this issue below. See Resp. Br. 21-22.

concerning the representation of respondents in the claims proceedings simply miss the mark. Respondents were not entitled to be individually represented in those proceedings. See *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d 495, 503-504 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

For the same reason, respondents' reliance on *Hansberry* v. *Lee*, 311 U.S. 32 (1946), is wholly misplaced. In *Hansberry* this Court held that persons vicariously represented in a class action could not be bound by the judgment in a case where a putative representative party had interests that conflicted with those of the persons purportedly represented. But, as the court of appeals acknowledged (Pet. App. 8a-9a), this simply is not a class action. A better analogy to the situation presented here would be the relationship between an action by a corporation and a subsequent shareholder derivative action. It is, of course, settled that a judgment binding on the corporation is also binding in a shareholder's derivative suit.[6] Plainly, a shareholder's lack of separate representation in a prior action by a corporation would not exempt him from the preclusive effect of the prior judgment in a subsequent derivative action. Similarly, respondents cannot complain that they were not represented separately from Western Shoshones generally in the claims proceedings. Cf. *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 32-33 n.16 (holding an Indian tribe to be bound by a judgment, notwithstanding the alleged conflict of interest on the part of the United States, where the United States as representative of an Indian tribe in litigation had a full and fair opportunity to be heard). Like a shareholder who is subject to issue preclusion when he asserts a corporate claim, respondents

[6] See, *e.g.*, *Green* v. *American Broadcasting Companies*, 572 F.2d 628 (8th Cir. 1978); *Transcontinental Oil Corp.* v. *Trenton Products Co.*, 560 F.2d 94 (2d Cir. 1977); Restatement (Second) of Judgments § 59(2) & comment c (1982).

are subject to the bar of Section 22(a) simply because they have asserted Western Shoshone title.

b. Nor can respondents avoid the bar of Section 22(a) by attacking the representation received by *the tribe* in the claims proceedings as inadequate. Respondents acknowledge (Br. 30) that, under the Indian Claims Commission Act, the Commission determined that the Temoak Band was authorized to maintain, on behalf of the entire Western Shoshone identifiable group, a claim for damages for extinguishment of aboriginal title to an area including 22 million acres of Nevada. See also U.S. Br. 5-6. Of course, respondents and the amici challenge the correctness of the Commission's determination of the representation issue and assert that the position taken by the Western Shoshones before the Commission was unwarranted. But like the underlying aboriginal title issue itself, these matters have been finally resolved against respondents by findings and a final judgment of the Claims Commission and Court of Claims.

As explained in our opening brief (at 8-9), years after the claims proceeding had commenced, at a time when the major issues in the case had already been resolved, the Western Shoshone Legal Defense and Education Association, an organization with which the present respondents were affiliated, sought to intervene in the claims proceeding. They sought to amend the claim to reflect the position that Western Shoshone title to a part of the area covered by the claim remained unextinguished. As a basis for intervention, the Association claimed: (i) that the Shoshones had been misled as to the nature and scope of the claims proceedings, and (ii) that the Temoak Band was not an appropriate representative of the Western Shoshone generally, who, the Association claimed, believed that aboriginal title had not been fully extinguished. The Association also claimed that, as applied in the Western Shoshone claims proceeding, the representational scheme of the Indian Claims Commission Act effected a denial of due process. In short, the Association

raised each of the contentions put forward by respondents and the amici in this Court. See *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d at 497, 499-502, 503-504.

The Court of Claims affirmed the Commission's denial of the motion for intervention. The court observed that Section 10 of the Indian Claims Commission Act, 25 U.S.C. (1976 ed.) 70i, accords tribal governmental organizations recognized by the Secretary of the Interior the exclusive prerogative to maintain a claim before the Commission; that the Commission had determined that the Temoak Band was a proper representative of the entire Western Shoshone group; and that, under the statute, the Temoak Band accordingly was entitled to maintain the claim filed, absent a showing of "fraud, collusion, or laches." 531 F.2d at 499. The court determined the Association's claims of fraud and collusion to be unfounded. *Id.* at 499-501. The mere existence of dissension among the Western Shoshones as to whether the claim should be pursued, the court held, was not a sufficient basis for impeaching the exclusive representation status conferred under the procedure designed by Congress. *Id.* at 501.

The Court of Claims also rejected the Association's due process challenge to the constitutionality of the exclusive representation provisions of the Indian Claims Commission Act, as applied in the setting of the Western Shoshone claim. The court observed that if the representative is unresponsive to tribal interests as perceived by the majority faction, and tribal processes for resolution of the dispute are unavailing, the allegedly unrepresented group is obliged to make the conflict of position known to the court in timely fashion. 531 F.2d at 503-504. This Court denied certiorari (429 U.S. 885 (1976)).[7] In these

[7] The arguments made in the Association's certiorari petition are the same as those which respondents seek to interject here. The Association asserted that the denial of its intervention motion raised "important constitutional questions concerning due process under the exclusive representation provisions of the Indian Claims

circumstances, even if the question had been properly preserved for review by this Court, respondents would be foreclosed—both by common law collateral estoppel and by Section 22(a) of the Indian Claims Commission Act—from questioning the preclusive effect of the Court of Claims' judgment and award on the grounds asserted here. Respondents' due process claims have been fully and fairly litigated and may not be relitigated here.[8]

c. Respondents' due process contentions based on allegedly inadequate representation of the tribe are, in any event, devoid of merit. As explained in our opening brief (at 4-6 & n.3), the Western Shoshones have no constitutional right to compensation for extinguishment of their aboriginal title to their ancestral domain. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279-285 (1955). Their claim accordingly is entirely dependent upon the broad provisions of the Indian Commission Claims Act, which provided the government's consent to be sued and conferred a substantive right to damages for "claims based upon" failure to adhere to a standard of "fair and honorable dealings"—claims that were "not recognized by any existing rule of law or equity" (25 U.S.C. (1976 ed.) 70a(5)).[9] Moreover, because, as respondents and the

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Commission Act" (Pet. at 8-9, *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, No. 76-90).

[8] Respondents complain (Br. 16; see also ILRC Br. 13), that they were denied an evidentiary hearing on their motion to intervene. But the Court of Claims upheld the Commission's denial of an evidentiary hearing, observing that the facts alleged concerning the representational issue "could all be accepted *arguendo*, without necessitating a trial or evidentiary hearing," because they did not establish any lack of capacity or other legal defect in the Temoak Band's representation. 531 F.2d at 504. The court also noted that the intervenor's claims were purely conclusory and were unsupported by detailed factual allegations or affidavits such as were required under the Commission's rules. *Id.* at 502 & n.14.

[9] Respondents quarrel (Br. 15 n.23) with the court of appeals' determination (Pet. App. 2a n.1) that they had abandoned any alternative contention that the Western Shoshones held recognized

amici emphasize, there was and is no organized or recognized tribal entity directly corresponding to the historical Western Shoshone who suffered the extinguishment of title underlying the claims proceeding, the claim could not have been prosecuted at all but for the special statutory provision for maintenance of claims by any "Indian tribe, band or *other identifiable group of American Indians* residing within the territorial limits of the United States" (25 U.S.C. (1976 ed.) 70a (emphasis added)).

Because Congress created the novel legal right upon which the Shoshone claim was predicated, and because "Indian claims proceedings are," in the court of appeals' words, "highly extraordinary creatures of statute" (Pet. App. 8a-9a), Congress was authorized—and indeed required—to specify who might institute such proceedings. And Congress was free to accord preference to recognized tribal entities as representatives, as it did in 25 U.S.C. (1976 ed.) 70i. Furthermore, where, as here, a recognized tribal entity existed at the time the claim was filed but did not include all who claimed descent from the

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title to the lands covered by the claims proceedings. The court of appeals' determination is accurate. Although respondents stated in their reply brief below (at 18) that they "have consistently argued that Western Shoshone title was recognized in the Treaty of Ruby Valley," no such argument is actually to be found in their submissions to the court of appeals; the burden of the argument cross-referenced by respondents in this connection was instead that the Treaty protected their aboriginal title against informal extinguishment by specifying specific means by which extinguishment could be accomplished (see Resp.'s Opening Brief as Appellant in the Court of Appeals 25-26). In any event, any claim of recognized title is, as we have explained (U.S. Opening Br. 5-6 n.3), contrary to *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 348 (1945). And respondents made no effort whatsoever in the court below to reconcile a claim of recognized title with this Court's decision in *Northwestern Band*. Accordingly, analysis of respondents' due process argument must proceed on the basis that the claim for compensation depends entirely upon the extraordinary "fair dealings" jurisdiction of the Claims Commission.

historic Western Shoshone tribal grouping, it was reasonable for the Commission to determine, pursuant to the authority conferred by Congress (see 25 U.S.C. (1976 ed.) 70i), that such an entity was authorized to maintain this claim, in the absence of any *timely* objection from persons challenging the credentials of the representative. See *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d at 503-504. Notwithstanding any claim made with the benefit of hindsight that a different course would better have served the Western Shoshones' interests, no denial of due process results from assigning preclusive effect, as against the tribal group and persons claiming under it, to a judgment procured by the representative authorized to proceed under the statutory scheme. See *Nevada* v. *United States*, slip op. 24-25 nn. 14 & 15, 32-33 n.16.

As the Court of Claims has twice emphasized, its orders denying intervention and, later, barring the Temoak Band's efforts to alter its litigation position, rested upon the unjustified tardiness of these procedural maneuvers; those orders were not based on any unwillingness to consider a representational dispute timely presented or to allow an Indian group to adopt the position that it retains title to its ancestral lands. *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 531 F.2d at 498-499 & n.6, 502-503 & nn.13 & 14, 504 & n.18; *Temoak Band of Western Shoshone Indians* v. *United States*, 593 F.2d 994, 997-999 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979). Especially in light of the Court of Claims' determination that "no adequate excuse was offered for the long delay" here (593 F.2d at 997; see also 531 F.2d at 498-499, 501-502 n.13), neither the Commission's procedural rulings nor the preclusive effect which Congress has assigned to the judgment of the Commission in this ejectment action offends due process.

3. *The individual title claim*—Respondents also contend (Br. 33-38), in the alternative, that even if their claim of Western Shoshone aboriginal title is precluded

by the prior Commission litigation, they nevertheless individually hold title to the subject lands under the doctrine of *Cramer* v. *United States*, 261 U.S. 219 (1923). Again, the courts below did not address this issue, and it is not properly before the Court. Moreover, the argument was not presented even to the courts below.[10] The parties accordingly did not compile a factual record below sufficient to support any ruling concerning this highly fact-dependent contention; there are no pertinent findings in the record. Plainly this Court should not attempt to resolve the issue on the basis of respondents' untested allegations.

The existing record, moreover, tends to undercut respondents' claim to individual ownership of the subject lands. In *Cramer*, this Court upheld the individual title claims of three Indians who had settled upon approximately 175 acres of vacant public lands, fenced the tract, reclaimed, irrigated, cultivated, and improved the soil, and established fixed homes thereon. 261 U.S. at 226-228. In short, the Indians had done everything needed to perfect a claim under the homestead laws, but, as the Court noted, *id.* at 226-227, they could not qualify under those laws as the homestead provisions had not yet been extended to Indians at the time the claim of the third party arose. Under these circumstances, the Court held that the occupancy rights of the Indians should be recog-

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[10] Respondents' assertion (Br. 4, 22) that they presented this contention below is incorrect. While the respondents did refer to *Cramer* in the court below, they generally did so in support of the argument that tribal aboriginal title remained unextinguished. See Appellants' Br. 20, 24; Reply Br. 20, 31, 39, 41. In their reply brief below, respondents alleged (at 4), in passing, that they held "'individual use and occupancy' rights" under the *Cramer* doctrine as to certain sections of land *other* than those at issue here, and suggested elsewhere (at 35), in a single isolated sentence, that those rights apply to the subject lands. But no effort was made to establish the applicability of the *Cramer* doctrine. Plainly, the court of appeals did not recognize that any such issue was proffered for its decision.

nized, but limited its ruling to the lands enclosed (*id.* at 234-236).

The facts here contrast sharply with those in *Cramer*. Respondents claim individual title not just to 175 acres, but to 5,120 acres. Respondents have not established homes on the lands at issue; rather, they acknowledge (Br. 2) that their home is situated on other former public lands which were patented to their father under the homestead law. Nor is there any allegation that respondents ever fenced, cultivated, reclaimed or improved any of the subject land, or that they took any action that might establish a right of possession under pre-emption or homestead laws. Indeed, respondents appear to have acknowledged below (Reply Br. 4) that their *Cramer* claim is applicable to *other sections* of land which they allegedly have fenced or irrigated (see note 10, *supra*). Clearly, the present record does not establish respondent's *Cramer* claim.

B. The Western Shoshones' Claim Has Been Paid

We now turn to the single ground upon which the court of appeals rested its decision that Section 22(a) does not bar the respondents' assertion of subsisting Western Shoshone title. We note initially that both respondents (Br. 48) and the amici (WSNC Br. 36) take considerable pains to dissassociate themselves from the primary rationale offered by the court of appeals for its decision: the policy judgment that a "channel of congressional relief" from the preclusive effect of the Claims Commission's judgment should be "kept open by an interpretation of section [22(a)] that does not bar collateral litigation which might produce results highly informative to Congress" (Pet. App. 15a). Respondents thus ignore the legislative history which confirms that Congress deliberately designed the Indian Claims Commission Act to eliminate the need for the kind of congressional review of Indian claims that the court of appeals sought to foster, and that Congress expected In-

dian Claims Commission awards to be routinely paid. See U.S. Br. 33-36.

Respondents also ignore the course of administrative and legislative evolution of the mechanisms for appropriation of funds in payment of tribal judgments and distribution of judgment funds reviewed in our opening brief. The language and legislative history of the various Acts governing appropriation and distribution confirm that Congress has understood that claims underlying tribal judgment funds held in trust for the Indians' benefit have been paid and discharged. See U.S. Br. 38-45. Finally, and perhaps most tellingly, respondents do not even mention this Court's decision in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85-86 (1977), which clearly equates appropriation of funds to pay a tribal judgment into a judgment fund held in trust with payment of the claim, and treats the distribution of the fund to individuals as an entirely separate process.[11] "[A]ppropriated [judgment] funds," *Weeks* unequivocally confirms, are "tribal property" (430 U.S. at 85). The arguments presented by respondents in support of a contrary conclusion do not bolster the court of appeal's erroneous conclusion.

1. Respondents commence with the erroneous premise (not indulged by the court of appeals) that 25 U.S.C. 118, enacted in 1911, "defines" the term "payment" for purposes of Section 22(a). But of course 25 U.S.C. 118 does not provide any *definition* of payment, much less one applicable to payment of a claim for purposes of the Indian Claims Commission Act. It is simply an authorization for distribution of judgment funds. As we already have pointed out (U.S. Br. 38-39 n.22), the only relevance of Section 118 is that Congress in that provision expressly equated appropriation of moneys into a judg-

[11] The Court stated: "Congress appropriated funds to pay the award [to the Delaware Indians under the Indian Claims Commission Act] and *later* enacted Pub. L. 92-456 providing for its distribution." 430 U.S. at 79 (emphasis added).

ment fund with the "satisfaction of the judgment" (25 U.S.C. 118), without regard to subsequent distribution of those moneys. Moreover, respondents overlook the language of Section 22(a) itself, which raises a bar to relitigation upon "payment of *a claim*" (emphasis added). The payment of a tribal claim is necessarily effected by payment to the tribe—or, as here, to its trustee, and cannot turn on whether those funds in turn have been distributed to tribal members. See *Weeks*, 430 U.S. at 85-86. Thus, while a transfer of tribal funds to an individual Indian "from moneys appropriated by Congress in satisfaction of the judgment of any court" was denominated in Section 118 as a "payment" to the individual Indian, it scarcely follows from this that appropriation of moneys in satisfaction of a *tribal* judgment and their segregation in a special legally protected trust fund for the benefit of the tribal entity does not constitute "payment of a [*tribal*] claim" for purposes of Section 22(a).

2. Remarkably, the remainder of respondents' argument nevertheless rests upon the infirm foundation just discussed. Respondents simply assume that 25 U.S.C. 118 defines payment for purposes of Section 22(a) as distribution, and then proceed to explore the operation of the Distribution of Judgment Funds Act in that light. Thus, they argue (Br. 39-42) that if a distribution plan is rejected by Congress, or if (as here) the time allotted for submission of a distribution plan by the Secretary expires, the claim cannot be deemed paid because legislation is then necessary to authorize the Secretary of the Interior to apply or distribute the judgment fund (Br. 40, 46-47; see also WSNC Br. 33-34).

However, these arguments formed no part of the court of appeals' rationale, and they are, in any event, entirely unsound. As an initial matter, they assume rather than establish the critical point; only if it first is established that appropriation of moneys into a tribal judgment fund is not sufficient to pay the tribal claim is it relevant to consider obstacles to completion of the distribution process. Moreover, to the extent that respondents' argument is that the obstacles to implementation of a distribution plan here *independently* require that the Western Shoshone claim be deemed "unpaid," it would rob the operation of Section 22(a) of all certainty; a given claim might be deemed paid at one time, and later deemed unpaid because of subsequent legislative or administrative developments.

Moreover, it is irrelevant that distribution will, in this instance, require an Act of Congress. Authority "over the management and distribution of lands and property held by [Indian] tribes" resides in the first instance with Congress. *Weeks*, 430 U.S. at 85-86. The various arrangements made at different times by Congress and the Secretary to govern the distribution of tribal judgment funds (see U.S. Br. 38-41) have no bearing upon the question whether a tribal judgment has been paid. As our opening brief explains (at 39-40), for a period prior to enactment of the DJFA, all distribution of judgment funds required congressional authorization; yet Congress made clear that it regarded those funds to be held in trust as tribal funds. In interposing a requirement of legislative authorization for distribution, Congress simply exercised its "authority * * * to control tribal assets" (*Weeks*, 430 U.S. at 86), it did not negate the Western Shoshones' beneficial interest in those assets.[12]

Nor is it relevant that enactment of a distribution plan may take time. As respondents make clear (Br. 40), the present impasse is entirely attributable to Western Shoshones' refusal to cooperate in framing a distribution plan, in part because of the pendency of this case. In any event, the judgment fund remains at all times in the beneficial ownership of the Western Shoshones and is

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[12] Contrary to respondent's implication (Br. 46-47), nothing in Senator Melcher's letter of August 4, 1980, refusing an extension for the Secretary's submission of a distribution plan suggests that Congress views the Western Shoshone tribal claims as unpaid. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983).

rapidly growing; we are advised by the Secretary that the fund now exceeds $43.5 million.[13] Thus any delay in distribution does not operate to erode the Western Shoshones' property rights.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1984

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[13] Respondents' suggestion (Br. 46-46) that the Western Shoshone judgment fund should be deemed to be held in escrow rather than in trust for the Shoshones is inconsistent with the entire body of law governing the duties of the government when it holds Indian property. See U.S. Br. 23-24, 29-30. It is also inaccurate. Unlike in an escrow situation, there is no condition upon which ownership of the judgment fund may simply revert to the United States.

Respondents also argue (Br. 47) that payment has not been completed here, reasoning that the government's tender has yet to be accepted. But as respondent seems to recognize (Br. 46), the Secretary, as trustee, has accepted the award and holds it on behalf of the Shoshones. See U.S. Br. 23-24, 27-30. In any event, it is inconceivable that Congress intended to authorize Indian tribes to destroy the preclusive effect of a completed adjudication by withholding approval for the Secretary's acceptance of funds in satisfaction of an Indian Claims Commission judgment.

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